Supreme Court, U.S.
FILED

931692 APR 26 1994

No. _____

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In The

Supreme Court of the United States

October Term, 1993

COUNTY OF SAN DIEGO, AND
THE BOARD OF SUPERVISORS FOR THE
COUNTY OF SAN DIEGO,

Petitioners,

v.

JOHN MURPHY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LLOYD M. HARMON, JR.
County Counsel
DIANE BARDSLEY, Chief Deputy
By IAN FAN, Deputy
1600 Pacific Highway, Room 355
San Diego, California 92101
Telephone: 619-531-6218

Counsel of Record
for Petitioners

JEROME A. BARRON
720 20th Street, N.W.
Washington, D.C. 20052

Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1:15 PM

QUESTION PRESENTED

Did the Ninth Circuit incorrectly fail to require *Pullman* abstention when interpreting a unique California constitutional provision which had not been clearly decided?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceeding below were:

Petitioners/Appellants:

The County of San Diego; and its Board of Supervisors

Respondent/Appellant:

John Murphy

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To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners County of San Diego and its Board of Supervisors respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 3-38, *infra*) is reported at 990 F.2d 1518. The opinion of the district court (App. 47-92, *infra*) is reported at 782 F.Supp. 1420.

JURISDICTION

The court of appeals entered its judgment on March 23, 1993. App. 4, *infra*. The court of appeals extended the time for petitioners to file for rehearing, and on April 26, 1993 petitioners filed for rehearing, with the suggestion of appropriateness for rehearing en banc. On March 14, 1994, the court of appeals denied rehearing, and rehearing en banc. App. 2, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The "no preference" clause of the California Constitution states as follows: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const., art. I, § 4.[1]

[1] The complete text of article I, § 4 of the California Constitution reads as follows:

> "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace and safety of the State. The Legislature shall make no law respecting an establishment of religion.
>
> "A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs."

STATEMENT

This petition concerns a thirty-six foot cross known as the Mount Helix cross which was erected in the 1920's by two children as a memorial to their mother. In 1929, the cross and the land around it, including a nature theater, was deeded to the County of San Diego. Several conditions were attached to the transfer, including the requirement that Easter sunrise services be held at the nature theater on an annual basis "open to the peoples of all creeds, religions, and nations." The cross was also to be lighted on certain nights, including Christmas evening through New Year's night, the night before Easter, August 16 (the birthday of the mother), August 29 (the birthday of the donator of the cross), and Thanksgiving evening. The deed included provision for a trust fund to maintain the property and to help pay for the expenses of the Easter sunrise services.

John Murphy filed suit against the County of San Diego and its Board of Supervisors on January 30, 1990. Murphy claimed that the mere presence of the cross on public land violated the establishment clause of the First Amendment of the United States Constitution, as well as article I, § 4 and article XVI, § 5 of the California Constitution. The County of San Diego answered the complaint on February 16, 1990. By order filed on April 30, 1990, the district court ordered that motions for summary judgment be heard on November 13, 1990.

The parties filed cross-motions for summary judgment. Although oral argument was held on November 13, 1990, on February 5, 1991 the district court deferred ruling on the motions pending decision in *Hewitt v. Joyner*,

940 F.2d 1561 (9th Cir.), *cert. denied*, 112 S.Ct. 969 (1991). *Hewitt* was decided on July 31, 1991. On December 3, 1991, the district court issued its decision. App. 47, *infra*.

The district court's decision was limited to the California Constitution's no preference clause, article I, § 4. Relying on two California cases, *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) and *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566 (1989), as well as the decision of the court of appeals in *Hewitt*, the district court identified five factors which it considered to be highly probative of governmental preferential treatment under the California no preference clause: (1) religious significance of the item; (2) size and visibility; (3) whether the display includes comparable significant items of other religions; (4) the historical background of the item in question; and (5) location. App. 66, *infra*. Applying these factors, the district court concluded that the Mount Helix cross was a "prominent government display of a solitary symbol laden with religious meaning, the sectarian significance of which is moderated neither by the display's history nor by its remoteness from symbols of governance." App. 75, *infra*.

The district court also issued a permanent injunction "forbidding the permanent presence of [the] cross on . . . public property . . . ." App. 91, *infra*. Petitioners were given three months to comply with this order, and further stays were to be sought from the court of appeals. *Id*.

On February 13, 1992, the court of appeals denied petitioners' motion for a stay pending appeal. App. 46, *infra*. Petitioners then filed an emergency motion seeking

rehearing of that decision, with the suggestion for en banc consideration. On February 21, 1992, the court of appeals temporarily stayed the district court's order pending an en banc vote on the denial of the stay. App. 45, *infra*. It eventually issued an order on March 19, 1992 staying the injunction pending appeal. App. 43, *infra*.

In the meantime, the County through its Board of Supervisors voted to transfer the Mount Helix cross and a thirty-foot diameter parcel of land under it to the San Diego Historical Society. The vote took place on February 25, 1992, and the transfer was thereafter effected. App. 30, *infra*. As a result, the County voluntarily withdrew its emergency motion for rehearing on the stay issue. App. 42, *infra*.

The case was argued before the Ninth Circuit on May 5, 1992. However, submission was withdrawn by order filed June 23, 1992, and petitioners were ordered to file a supplemental brief addressing issues related to the interests of the original grantor, the 1992 conveyance, the appointment of a trustee, and whether any disputed facts remained for trial. App. 40-41, *infra*. One of the court's questions specifically addressed the issue of mootness of the appeal. Petitioners filed their supplemental brief in July 1992, and among other things argued that the case was not moot.

The matter was resubmitted on March 16, 1993, and the court of appeals affirmed the district court's decision on March 23, 1993. It initially found that the district court did not abuse its discretion in refusing to abstain. App. 15, *infra*. It based this on the existence of interpretative caselaw in the *Fox* and *Okrand* decisions, as well as its

own interpretation of the California no preference clause in *Hewitt*. App. 14-15, *infra*. Mootness was not discussed.

The court of appeals then proceeded to apply the same five factors identified by the district court. App. 20, *infra*. It found that "the size and religious significance of the cross, along with the lack of other religious symbols or independent historical significance, creates an appearance of religious preference." App. 25, *infra*.

Petitioners sought rehearing or rehearing en banc on April 26, 1993. On March 14, 1994, the court of appeals denied rehearing. App. 2, *infra*.

REASONS FOR GRANTING THE PETITION

As this Court noted fifty-three years ago,

> "The last word on the meaning of [a state statute] . . . belongs neither to us nor to the district court but to the supreme court of [the relevant state]. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."

Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 499-500 (1941) (citations omitted). The same considerations are present in the instant case: a federal court of

equity has interpreted a clause of the California Constitution whose meaning has not been clearly decided. Consequently, the Ninth Circuit's decision conflicts with a decision of this Court. Since the California Supreme Court is the ultimate arbiter of the California Constitution, *Sands v. Morongo Unified School Dist.*, 53 Cal.3d 863, 903 (1991) (Lucas, C.J., concurring), *cert. denied*, 112 S.Ct. 3026 (1992), the court of appeals incorrectly decided the abstention issue.

I. The Court of Appeals' Decision Conflicts With *Reetz v. Bozanich*

In *Pullman*, this Court set forth the doctrine that when state action is challenged in a federal district court as violative of the federal constitution, and the case at the same time presents a possibly dispositive issue of state law, the court should abstain from deciding the federal issue pending resolution of the state law issue. The theory of the *Pullman* doctrine is that a decision on the state law issue may make resolution of the federal constitutional issue unnecessary. Yet the Court has also stressed that mere difficulty in ascertaining state law is not itself a basis for sending litigants to a state court to commence a new lawsuit. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974).

Pullman represents a particularly delicate problem where a federal district court is called upon to construe a difficult issue of interpretation raised by a state constitutional provision. If the federal courts had to apply *Pullman* every time state action was challenged under a state constitutional provision, abstention would always require

resolution by a state court of the state constitutional provision and the deferral of the federal issue. Since state and federal constitutions frequently contain parallel provisions, such a doctrine would have a severely limiting effect on the ability of federal courts to resolve federal constitutional issues.

The doctrine of *Reetz v. Bozanich*, 397 U.S. 832 (1970), resolves this problem. Under *Reetz*, abstention under *Pullman* is required if the state constitutional provision presents a difficult problem of interpretation and the state constitutional provision is unique. *Id.* at 86-7. "[A]bstention is justified if there is a *unique* state constitutional provision. . . . " E. Chemerinsky, *Federal Jurisdiction* 601-02 (1989) (emphasis added).

As discussed below, the court of appeals wrongly held that the district court did not abuse its discretion in refusing to abstain.

A. *Reetz* is not distinguishable

In holding that the district court did not abuse its discretion in refusing to abstain, the court of appeals relied on the existence of California caselaw which interpreted the California Constitution's no preference clause, and the fact that in *Hewitt* it had previously interpreted the same clause. App. 14-15, *infra*. In reaching this holding, the court of appeals distinguished *Reetz*.

Reetz concerned a challenge to Alaska laws and regulations which limited salmon net gear licenses for commercial fishing to persons who either previously held such licenses or who held a commercial fishing license for

three years. A three-judge court decided that this regulatory scheme violated both the Fourteenth Amendment's equal protection clause as well as provisions of the Alaska Constitution. *Id.* at 83-4. This Court reversed, finding that "the federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions." *Id.* at 87.

The court of appeals attempted to distinguish *Reetz* on the basis of "Alaska's unique and uninterpreted constitutional provisions regarding fishing rights." App. 14, *infra*. While *Reetz* does use language referring to the unique quality of fish resources in Alaska, the critical feature of *Reetz* is that it involved unique and uninterpreted provisions of the Alaska Constitution, provisions which had no parallel in the federal constitution. *Reetz* thus "is the classic case in [the] tradition [of avoiding needless friction between federal pronouncements and state policies], for [t]here the nub of the whole controversy may be the state constitution." *Reetz*, 397 U.S. at 87. In other words, "classic" cases for abstention involve situations in which resort to the state constitution is required because the provision at issue has no textual analogue to the federal constitution. In this case, the California no preference clause has no federal counterpart. In addition, there is a demonstrable lack of clarity concerning the meaning of the no preference clause by the California state courts. *See* section B, *infra*. The clear fact is that this case, like *Reetz*, presents a "classic" case for abstention: it is not distinguishable on the basis of subject matter and is in fact directly analogous to *Reetz* in

that it involves a unique provision of state constitutional law.

B. California caselaw on the subject is not clear

The court of appeals also found that *Reetz* was not applicable because "[h]ere, we have interpretative case-law. Moreover, this is not the first time we have had occasion to interpret the religion clauses of the California Constitution." App. 14-15, *infra* (citations omitted). This begs the question.

"An uncertain or unclear issue of state law is the *sine qua non* of *Pullman* abstention." J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, 1A Part 2 *Moore's Federal Practice* ¶ 0.203[1], at p. 2106 (2d ed. 1993). *See also Harman v. Forssenius*, 380 U.S. 528, 534 (1965) (*Pullman* abstention should be applied only when state law is uncertain). Thus, whether state law is uncertain or unclear is the question to be answered.[2] The fact that caselaw exists or the court of appeals has interpreted the California Constitution is besides the point if such interpretations are not clear.

California law is uncertain on the issues presented by this case. California's no preference clause has rarely been discussed, and each case is fact specific. None of those cases assists in predicting how a state court would judicially view the Mount Helix cross. A review of those cases confirms this.

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[2] As would be expected, a federal court should not abstain when the meaning of the state law is unambiguous. *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971).

1. The most recent California case to discuss the no preference clause was *Sands*. In that case, a majority of the California Supreme Court held that the United States Constitution forbids religious invocations and benedictions at public high school graduation ceremonies. 53 Cal.3d at 867 (Kennard, Broussard, J.J.), 53 Cal.3d at 884 (Lucas, C.J., concurring), 53 Cal.3d at 905 (Mosk, J., concurring), 53 Cal.3d at 914-15 (Arabian, J., concurring). However, only three justices (Kennard, Broussard, and Mosk) concluded that this practice violated the California no preference clause, while the two dissenting justices found that no violation had occurred, and the remaining two justices declined to reach the state constitutional issues. *See id.* at 902 (Lucas, C.J., concurring). As a result, the court's judgment "does not rest on the state Constitution; any resolution of the state constitutional issues will necessarily await another day." *Id.* Thus, contrary to the court of appeals' footnote in this case, App. 14 n.3, *infra*, *Sands* is of no guidance to discerning whether the presence of the cross on Mount Helix violates the no preference clause.

2. Nor are the other California cases of any help in applying the no preference clause to the Mount Helix cross. The only California Supreme Court case to hold that the clause had been violated was *Fox*. That case concerned the illumination of a "huge" cross on the Los Angeles City Hall. Key to the California court's decision was the "location, size, and visibility of the Los Angeles cross . . . " 22 Cal.3d at 795. The location of the cross was the City Hall (the seat of government for the City of Los Angeles), the size was "huge," and the cross was visible for miles in many directions. *Id.* at 794. Based on these

factors, plus additional facts which indicated that the real purpose of the city's display was religious, *see Carpenter v. City & County of San Francisco*, 803 F.Supp. 337, 343 (N.D.Cal. 1992), *appeal docketed*, No. 92-16767 (9th Cir. Oct. 29, 1992), the California Supreme Court concluded that the Los Angeles City Hall cross evinced a governmental preference of Christianity over other religions.

This analysis does not assist in applying the no preference clause to the Mount Helix cross. In determining whether government is giving preference to a religion, courts utilize an objective test. *See Fox*, 22 Cal.3d at 804 (Bird, C.J., concurring). Thus, the question is whether a reasonable observer would believe that government is giving preference to a religion. *See County of Allegheny v. ACLU*, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring) (use of reasonable observer test under endorsement analysis); *see also Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th Cir. 1993), *cert. denied*, 126 L.Ed.2d 657 (1994) (establishment clause case). Unlike the fact pattern in *Fox* in which a cross was emblazoned on the face of city hall, a reasonable observer would not associate the location of the Mount Helix cross with government. The situation of John Murphy, the respondent in this petition, illustrates this point. Murphy lived in the area for approximately seventeen years before he learned that the cross was on County land. *See* Excerpt of Record (filed in the court of appeals) 33, depo 3:19-21, 7:2-14. A reasonable observer could not tell that the Mount Helix cross was located on County land simply by viewing it.

Nor is the Mount Helix cross "huge." The cross on the Los Angeles City Hall was illuminated by arranging window blinds and lighting windows. *Fox*, 22 Cal.3d at

794. The Los Angeles cross was as tall as City Hall tower, *see id.* at 803 (Bird, C.J., concurring), and could be seen from many miles away. *Id.* at 796-7 (it could be viewed from the Pasadena Freeway). On the other hand, the Mount Helix cross is thirty-six feet tall. App. 10, *infra*. While large, it is not "huge."

And although the court of appeals found that the Mount Helix "cross is visible from a substantial distance," *id.*, this is inaccurate. The court of appeals based this on a finding made by the district court. *See* App. 50, *infra*. However, the district court found that the Mount Helix cross was only visible from the town of La Mesa and its vicinity (where the cross was located), as compared to the City of San Diego's Mount Soledad cross, which is visible from several miles away. App. 50 n.5, *infra*. In other words, the Mount Helix cross can only be seen from its immediate vicinity, while the Mount Soledad cross is visible from several miles away (as was the *Fox* cross).

Finally, unlike the situation in *Fox*, there are no additional facts which indicate that the real purpose behind the Mount Helix cross was religious. There is a difference between prohibiting the City of Los Angeles from a practice which was begun and continued for religious reasons, and compelling the County of San Diego to destroy a cross erected as a personal memorial on a piece of property donated to the County for public purposes.

Fox is thus of no help in discerning with any degree of certainty how a state court would apply the no preference clause in this case.[3]

3. The other case relied upon by the court of appeals is also not helpful. That case, *Okrand*, involved the display of a menorah in the rotunda of the Los Angeles City Hall. 207 Cal.App.3d at 568. The California court of appeals found that the display did not violate the California no preference clause for several reasons, including the fact that the menorah shared space in the rotunda with a Christmas tree, was small, unlit, and inconspicuous, and differed in degree from the Latin cross in terms of religious significance. *Id.* at 579. *Okrand*'s situation is dissimilar from the existence of a cross on a hill. *Okrand* relies on a context specific approach, *id.*, and thus is of no guidance in determining whether the existence of the Mount Helix cross on County property showed a preference for a religion.

4. The final case relied upon by the court of appeals was *Hewitt*. That case involved county ownership of a park which contained thirty-six statues and tableaus depicting the life of Christ, 940 F.2d at 1563, a situation

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[3] The court of appeals's attempt to distinguish a district court case involving the 103-foot Mount Davidson cross in San Francisco underscores the difficulty in making these judgments. In a curious footnote, the court of appeals "highlight[ed] the fact-based contextual inquiry required by these kinds of cases." App. 25 n.5, *infra*. The footnote implies that the Mount Davidson cross would withstand judicial scrutiny under the no preference clause. However, the footnote raises more questions than it answers, since the Mount Davidson cross is larger and more easily visible than the Mount Helix cross.

which the court of appeals conceded "the California courts have never addressed . . . " *Id.* at 1565. Although the court of appeals proceeded to pretend it was a state court, *id.*, the issue of abstention was apparently never raised by the parties. Moreover, *Hewitt* is highly fact specific, and thus of no assistance in this case. The statues were a static collection of Christian symbols displayed and maintained by the government. *Id.* at 1568. In addition, the religious message of the statuary was clear. *Id.* at 1569. The same cannot be said of the Mount Helix cross, which is simply a plain cross sitting on a hill constructed in memory of a local benefactor.

In short, the law is unclear whether the Mount Helix cross violates the California no preference clause. The only California case involving a cross is factually different. Under such circumstances, "a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." *Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986). Since "[t]he last word on the meaning of [the California Constitution] . . . belongs neither to [this Court] nor to the district court but to the supreme court of [California]," *Pullman Co.*, 312 U.S. at 499-500, the court of appeals should have abstained from deciding the state constitutional issue. The doctrine of abstention appropriate for the federal system is one "whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Pullman Co.*, 312 U.S. at 501. As in *Pullman*, "[r]egard for these important considerations of policy in

the administration of federal equity jurisdiction is decisive here." *Id.*

The court of appeals should have required abstention, and its failure to do so violated this Court's precedent. This case presents a difficult question of interpretation with respect to a unique state constitutional provision. The clear teaching of *Reetz* is that in such circumstances the federal district court should have abstained and awaited interpretation of the state constitutional issue by the California state courts. Certiorari should be granted to review this important issue.

II. The County's Transfer Of The Land Underneath The Cross Does Not Moot The Case

The County transferred the Mount Helix cross and a parcel of land underneath it to the San Diego Historical Society while the appeal was pending. After argument, the court of appeals requested supplemental briefing on, among other issues, the issue of mootness. The respondent argued strongly that the case was not moot, and was poised to fight against the transfer in district court. In fact, a special concurrence to the court of appeals' decision noted that nettlesome issues were raised by the transfer of the cross and land. Among the issues is the legality of the transfer itself. App. 35-36, *infra*. The presence of these issues is sufficient to keep this case from becoming moot. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 590 n.2 (1984) (Stevens, J., concurring). *See also Carroll v. Presidents & Commissioners of*

Princess Anne, 383 U.S. 175, 179 (1968) (presence of existing unresolved dispute defeats mootness).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

LLOYD M. HARMON, JR.
County Counsel
DIANE BARDSLEY, Chief Deputy

By IAN FAN, Deputy
Counsel of Record for
Petitioners

JEROME A. BARRON
Of Counsel

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ELLIS, Plaintiff-Appellee, v. CITY OF LA MESA, et al., Defendants-Appellants.	No. 92-55086 D.C. No. CV-90-0135-GT(P) No. 92-55087 D.C. No. CV-89-0820-GT
PHILIP PAULSON, HOWARD T. KREISNER & SOCIETY OF SEPARATIONISTS, INC., Plaintiffs-Appellees, v. THE CITY OF SAN DIEGO, Defendants-Appellant.	No. 92-55093 D.C. No. CV-90-0134-GT ORDER (Filed Mar. 14, 1994)
JOHN MURPHY, Plaintiff-Appellee, v. BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS, and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and THE COUNTY OF SAN DIEGO, Defendants-Appellants.	

Before: TANG, SCHROEDER, and BEEZER, Circuit Judges

The panel has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge in active service has requested a vote to rehear the matters en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ELLIS, *Plaintiff-Appellee,* v. CITY OF LA MESA, et al., *Defendants-Appellants.*	No. 92-55086 D.C. No. CV-90-0135-GT(P)
PHILIP PAULSON, HOWARD T. KREISNER & SOCIETY OF SEPARATIONISTS, INC., *Plaintiffs-Appellees,* v. CITY OF SAN DIEGO, *Defendant-Appellant.*	No. 92-55087 D.C. No. CV-89-0820-GT
JOHN MURPHY, *Plaintiff-Appellee,* v. BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS, and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and THE COUNTY OF SAN DIEGO, *Defendants-Appellants.*	No. 92-55093 D.C. No. CV-90-0134-GT OPINION

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding

Argued and Submitted May 5, 1992
Submission Withdrawn June 23, 1992
Resubmitted March 16, 1993
Pasadena, California

Filed March 23, 1993

Before: Thomas Tang, Mary M. Schroeder and
Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

**Individual Rights/Religious Freedom/
Constitutional Rights**

The court of appeals affirmed a judgment of the district court. The court held that highly visible, religiously significant Latin crosses, erected in public parks owned and maintained by local government, in the absence of any symbols of other religions, and without any independent historical significance, violated the No Preference Clause of the California constitution.

Appellant County of San Diego owns the Mt. Helix Nature Theatre, a public park. One of the highest hills in San Diego, Mt. Helix is topped, within the park, by a 36-foot-high Latin cross, the Mt. Helix Cross. The cross is visible from a substantial distance, and is used by pilots as a navigational aid. The cross and a small acreage were

deeded to the County in 1929 by a private donor. The conveyance requires the County to maintain the cross and prohibit any other monuments. It also requires annual Easter Sunday sunrise services be held at the park. The deed also established a trust to maintain the cross. The County is trustee, and county employees administer the trust's funds. County funds maintain the Mt. Helix Nature Theatre generally. The cross is illuminated at night year around.

Appellant City of San Diego owns a 170-acre public park atop Mt. Soledad. A 43-foot-high concrete Latin cross was erected on this site in the 1950s by a private association. Prior to that, the hill had been topped by a succession of crosses essentially since 1913. The cross can be seen from a substantial distance, including from an interstate highway. The private association maintains the cross and holds Easter Sunday services there annually. In 1954, at an Easter Sunday religious service, the cross was dedicated as a tribute to veterans of the World Wars and the Korean Conflict. The predecessor crosses at the site had no memorial associations.

Appellant City of La Mesa's official insignia depicts a cross atop the highest of several hills, centered in the design. The design is a representation of the Mt. Helix Cross. The depicted cross is several times larger than it would be if drawn to scale. The cross insignia appears on city police vehicles, and on shoulder patches on the uniforms of police, firefighters, and dogcatchers. It also appears on the City's letterhead.

Three separate lawsuits were brought regarding these matters. The district court consolidated the cases.

The court held that the usages violated the No Preference Clause of the California constitution, and granted summary judgment for the plaintiffs, issuing a permanent injunction forbidding the permanent presence of each cross in the public parks and of the insignia in its various uses.

[1] The California constitution guarantees the free exercise and enjoyment of religion without discrimination or preference. [2] California and federal case law define as relevant factors, in determining whether a display on public property violates the California constitution, the following: (1) the religious significance of the display; (2) the size and visibility of the display; (3) the inclusion of other religious symbols; (4) the historical background of the display; and (5) the proximity of the display to government buildings, or to religious facilities.

[3] With respect to the Mt. Helix Cross, pursuant to the deed, the County maintained the park and acted as trustee, responsible for fulfilling the terms of the trust. [4] The Latin cross is the preeminent symbol of many Christian religions, representing simply and clearly the crucifixion and resurrection, doctrines at the heart of Christianity. [5] The religious symbolism was amplified by the cross's size and visibility, as well as by its nightly illumination. [6] There were no other religious symbols in the Mt. Helix Nature Theatre, and the deed prohibited the display of other religious symbols, which might neutralize the appearance of preference. [7] The Mt. Helix Cross was associated with an annual Easter sunrise service since its erection in the 1920s. A display's historical significance must be independent of its religious content. [8] The historical association with Easter services simply

exacerbated the appearance of governmental preference for a particular religion. [9] The mere fact that the display stood on public property, when there was no conjunction of religious symbolism with the institutions of government, was not enough to call into play that particular locational concerns of the pertinent case law. [10] However, the appearance of religious preference is not necessarily either produced or prevented by any one of the evaluative factors. The particular facts of each case must be analyzed. Here, the size and religious significance of the cross, along with the lack of other religious symbols or independent historical significance, created an appearance of religious preference.

[11] With respect to the Mt. Soledad Cross, it was a Latin cross; was the focal point of the part in which it stood; and was unaccompanied by comparable symbols of other religions to moderate its sectarian message. [12] Even were it conceded that the cross had always been explicitly recognized and referred to as a war tribute, that would not obviate the appearance of preference. [13] The mere designation of a display as a war tribute is not enough to satisfy the No Preference Clause of the California constitution.

[14] With respect to the insignia of the City of La Mesa, its secular purpose (to represent a well-known local feature identifiable with La Mesa) did not lessen the preference the insignia exhibited for Christianity. [15] Whatever its intent, the insignia's design drew particular attention to the cross. [16] The design, when affixed to the uniforms of government officials, created the appearance of religious preference. That particular design violated the No Preference Clause.

COUNSEL

Mary Kay Jackson, Deputy City Attorney, San Diego, California, for the defendant-appellant.

John S. Meyer, Knutson & Meyer, La Mesa, California, for the defendant-appellant.

Michel B. Poyner, Deputy City Counsel, San Diego, California, for the defendant-appellant.

Marcellee E. Mihaila, Gray, Cary, Ames & Frye, San Diego, California, amicus curiae Mt. Soledad Memorial Association, for the defendant-appellant.

Arlington Ray Robbins, Robbins & Keehn, APC, San Diego, California, amicus curiae *In Pro Se*, for the defendant-appellant.

Anthony Caso, Pacific Legal Foundation, Sacramento, California, amicus curiae Pacific Legal Foundation, for the defendants-appellants.

Thomas F. Gede, Special Assistant Attorney General, Sacramento, California, amicus curiae State of California, for the defendants-appellants.

John L. Romaker, San Diego, California, Amicus Curiae Committee to Save the Crosses, an unincorporated Association, and the San Diego County Republican Party, for the defendants-appellants.

Keith A. Fournier, Virginia Beach, Virginia, Amicus Curiae American Center for Law & Justice, for the defendants-appellants.

John W. Vinson, Society of Separationists, Inc., Austin, Texas, for the plaintiff-appellee.

Michael L. Crowley, San Diego, California; Betty Wheeler, American Civil Liberties Foundation of San Diego & Imperial Counties, San Diego, California, for plaintiff-appellee.

Dan Bacal, El Cajon, California, for plaintiff-appellee.

David Ira Berman, San Diego, California, Amicus Curiae Anti Defamation League of B'Nai B'rith, for the plaintiffs-appellees.

Steven Green, Silver Springs, Maryland, Amicus Curiae Americans United For Separation of Church and State, for the plaintiff-appellee.

OPINION

BEEZER, Circuit Judge:

We consider three crosses. A 36-foot cross stands atop Mt. Helix in a county park. Another hilltop cross, the 43-foot Mt. Soledad Cross, stands in a city park. The third cross, a depiction of the Mt. Helix Cross, provides the focal point for one of the City of La Mesa's official insignia.

As to each, a lawsuit ensued. After consolidating the cases, the district court heard motions and cross-motions for summary judgment. Relying primarily on *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992), the court concluded that the crosses' permanent presence on public property violates the No Preference Clause of California's Constitution. The court

entered summary judgment in favor of the plaintiffs and issued "a permanent injunction forbidding the permanent presence of each cross on the public property or imprimatur where it currently appears." The government entities timely appealed. We affirm.

I

A. The Mount Helix Cross

In the mid-1920's, Cyrus Carpenter Yawkey and Mary Yawkey White placed a 36-foot Latin cross[1] on the summit of Mount Helix on privately owned land. The cross was erected as a memorial to Mary Carpenter Yawkey. Mt. Helix is one of the highest hills in San Diego County, and the cross is visible from a substantial distance. The cross also serves pilots as a navigational aid.

In 1929, Yawkey conveyed about 3.2 acres, including the cross and an amphitheatre, to San Diego County for uses and purposes specified in the deed. This county park is known as the Mt. Helix Nature Theatre. The conveyance obligates the County to maintain the cross, allows no other monuments to be erected in the park, and requires that "annually, on each and every Easter Sunday forever, religious services of a strictly non-sectarian character and appropriately suitable for commemorating the resurrection of the Lord Jesus Christ, as taught by the Christian churches of the world, shall be held at Sunrise" at the park. Although an Easter sunrise service has been

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[1] A Latin cross is "a figure of a cross having a long upright shaft and a shorter crossbar traversing it above the middle." Webster's New International Dictionary (3d ed. 1981).

held in the park every year since, the County stresses that it never enforced this provision against an applicant desiring to use the park for an alternative purpose on Easter morning.

The deed also established a trust fund, with the County as trustee, to maintain the cross and to contribute towards the Easter celebration. County employees administer the trust fund. Public funds contribute to the maintenance of the Nature Theatre as a whole.

The deed further requires that "[t]he Cross on the summit of Mount Helix shall be lighted" on several specific nights each year, including Christmas Eve and the evening before Easter. The County illuminates the cross every night of the year; the trust fund currently pays for the lighting, but county funds had been used for this purpose in the past.

Subsequent to the filing of this case, the County Board of Supervisors designated the Mt. Helix Nature Theatre and the cross within it as a historical landmark.

B. The Mount Soledad Cross

In 1913, private citizens placed a redwood cross atop Mount Soledad on a 170-acre parcel of land owned by the City of San Diego. The city council dedicated the property as a public park in 1916. Vandals destroyed the redwood cross in 1923; someone replaced it with a wood and stucco cross in 1934. A wind storm destroyed that cross in 1952. Subsequently, the city council granted permission to the Mt. Soledad Memorial Association, a private organization, to place another cross on Mt. Soledad.

The Association solicited private contributions and, without municipal funding, supervised and paid for the construction of the current 43-foot concrete cross. On some maps and in the local parlance, it is known as the "Soledad Easter Cross." The Mt. Soledad and Mt. Helix crosses have both provided a backdrop for weddings and baptisms.

The Soledad Cross can be seen from a substantial distance, including a portion of the interstate highway. The district court's summary judgment order states that the cross functions as the most important geodetic marker in San Diego County.

In 1954, at an Easter Sunday religious service, the cross was dedicated as a tribute to veterans of World War I, World War II and the Korean Conflict. The Association maintains the cross and, since its dedication, obtains a permit each year to conduct a sunrise service on Easter Morning. Although primarily maintained through private funds, the district court found some public funds have been expended to maintain the cross.[2] Since the filing of this action, veterans groups have held secular remembrance ceremonies at the site.

In its summary judgment order, the district court erroneously stated that the Mt. Soledad Cross, like the Mt. Helix Cross, is illuminated nightly. The parties agree that the Mt. Soleded Cross used to be illuminated, but that the practice ended after vandals repeatedly broke the lights.

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[2] The district court found that a painting supervisor with the City of San Diego's Building Maintenance Department paid a contractor $1,750.00 to repaint the cross.

On January 30, 1991, after this action was filed, the City of San Diego Historical Site Board designated the cross and the surrounding park as historical sites.

C. The La Mesa Insignia

The City of La Mesa's official insignia depicts a cross atop the highest of several hills, in the center of the design, between two clouds. The artist drew the cross several times larger than it would be if drawn to scale. As found by the district court, the insignia was chosen not because it incorporates a religious image, but rather because it depicts the prominent, identifying landmark for the city known as "The Jewel of the Hills."

At the time of this lawsuit, the insignia appeared on police vehicles and on the shoulder patches attached to police, firefighter [sic], and animal control personnel uniforms, and was used in official literature distributed by the city. The city maintains an official seal which does not depict a cross.

II

A. Abstention

Appellants argue that the district court should have exercised abstention pursuant to the doctrine announced in *Texas Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). We review the district court's refusal to abstain for an abuse of discretion. *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987).

Pullman abstention is appropriate where the state's constitution contains a provision unlike any in the federal

constitution and state court construction of its unclear or ambiguous clause might make a federal ruling unnecessary. *Reetz v. Bozanich*, 397 U.S. 82 (1970) (abstention appropriate given that the unique fishing provisions in Alaska Constitution had not been interpreted by Alaska courts).

Appellants argue that the California courts' interpretation of the state constitution's religion provisions remains unclear or, if relatively clear, poised for change. *See Pearl Inv. Co. v. City and County of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985) ("Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law.") (citation omitted), *cert. denied*, 476 U.S. 1170 (1986).

The legal landscape presented here differs dramatically from that presented in *Reetz*, by Alaska's unique and uninterpreted constitutional provisions regarding fishing rights. Here, we have interpretive caselaw. *See Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978) (interpreting California Constitution's religion clauses); *Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913 (Cal.Ct.App. 1989) (same).[3]

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[3] We note that the California Supreme Court has recently addressed the No Preference Clause. In *Sands v. Morongo Unified School Dist.*, 809 P.2d 809 (Cal. 1991), *cert. denied*, 112 S. Ct. 3026 (1992), the plurality quoted with approval the state Attorney General's observation that "[i]t would be difficult to imagine a more sweeping statement of the principle of government impartiality in the field of religion" than that found in the No Preference Clause. *Id.* at 820 (citation omitted).

Two members of the court expressly disagreed with the plurality's strict separationist reading of the California Constitution. *See id.* at 855 (Pannelli, J., dissenting); *id.* at 863 (Baxter, J.,

Moreover, this is not the first time we have had occasion to interpret the religion clauses of the California Constitution. *See Hewitt, supra* (discussing California case law regarding the No Preference Clause).

We perceive no "special circumstances" warranting *Pullman* abstention. *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973) (citations omitted). Accordingly, we hold that the district court did not abuse its discretion in reaching the merits of these cases.

B. Standing

Standing is a question of law we review *de novo*. *See Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985). To have standing to bring this lawsuit in federal court, each plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). Appellants argue that the plaintiffs fail to meet this standard.

We recently followed other circuits in holding that "when a plaintiff alleges that the government has unconstitutionally aligned itself with religion, standing may be based on finding that the plaintiff has been injured due to

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dissenting). Two other members of the court declined to address the California Constitution at all. *See id.* at 833 (Lucas, C.J., concurring); *id.* at 842 (Arabian, J., concurring).

We do not read the varied viewpoints expressed in *Sands* as necessarily portending an interpretive shift, nor do we read *Sands* as undermining in any way prior state court opinions interpreting the No Preference Clause.

his or her not being able to freely use public areas." *Hewitt*, 940 F.2d at 1564 (citing *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), and *ACLU of Georgia v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983)).

In *ACLU of Illinois*, the court found that the plaintiffs had standing where they departed from their usual route to avoid observing a government-owned, lighted cross. 794 F.2d at 267-69. In *ACLU of Georgia*, the court found that the plaintiffs had standing where they stopped using a state park which included a large illuminated cross. 698 F.2d at 1107-08.

John Murphy, a Catholic San Diego resident and taxpayer, challenges the constitutionality of the Mt. Helix Cross. Murphy attests that he "is offended by the use of public property and the expenditure of public money to display and illuminate the cross on Mt. Helix." Although he "otherwise would visit the [Mt. Helix Nature] Theatre and take out-of-town guests there to enjoy the panoramic view it offers, [he instead] avoids visiting the Theatre because of the large cross."

Philip K. Paulson and Howard T. Kreisner challenge the constitutionality of the Mt. Soledad Cross. Both Paulson and Kreisner are atheists, Vietnam combat veterans, San Diego residents, and taxpayers. They say that they are "deeply offended" by the presence of the cross on Mt. Soledad. Both attest that they would like to take in the spectacular views of San Diego from the park on Mt. Soledad but avoid doing so because of the cross' dominance of the hilltop.

Paulson and Kreisner are both members of the Society of Separationists, another plaintiff in the action contesting the maintenance of the Mt. Soledad Cross on public property. The Society, which is licensed to do business in California, is "dedicated to the complete and absolute separation of state and religion/church."

James Ellis, an Episcopalian, La Mesa resident, and taxpayer challenges the La Mesa insignia. He maintains that he is "deeply offended" by the expenditure of taxes for the purchase and use of insignia depicting a religious symbol. In order to avoid offending business clients or embarrassing himself, he has declined to invite business clients to his home when, but for the presence of the cross on the insignia, he would have invited them.

In all three of these cases, the district court properly determined that a plaintiff "has been injured due to his or her not being able to freely use public areas." *Hewitt*, 940 F.2d at 1564. Murphy, Paulson, and Kreisner avoid two public parks in San Diego which they would otherwise use. Ellis curtails his activities to lessen contact with the insignia displayed in his city. The Society of Separationists has standing through its members, co-plaintiffs Paulson and Kreisner. The district court properly held each of the named plaintiffs had standing to bring this case before the court. *See Kreisner v. City of San Diego*, No. 90-55354, slip op. at 1697 n.1 (9th Cir. March 3, 1993) (plaintiff's standing based on allegation that the challenged display interfered with his right to use public park).

III

We review *de novo* both the district court's grant of summary judgment, *Schlacter-Jones v. General Tel. of Cal.*, 936 F.2d 435, 438 (9th Cir. 1991), and its interpretation of state law, *Hewitt*, 940 F.2d at 1565.

Federal constitutional issues should be avoided when the alternative ground is one of state constitutional law. *Id.* Thus, although the plaintiffs' suits allege both federal and state constitutional violations, we turn first to the California Constitution.

[1] The California Constitution guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference." Cal. Const. art. I, § 4. This provision is known as the "No Preference" Clause. *See Okrand, supra.*

In Fox, supra, the California Supreme Court affirmed an order enjoining the thirty-year practice by the City of Los Angeles of illuminating a cross on City Hall during the Christmas holidays, and enjoining the eight-year practice of illuminating the cross on Easter Sundays, both Latin and Eastern Orthodox. The Court considered the "location, size, and visibility of the Los Angeles cross," noting in particular that the cross was illuminated on City Hall and was visible for many miles in many directions. 587 P.2d at 665. The court also pointed out that the illumination of only the Latin cross seemed "preferential when comparable recognition of other religious symbols is impracticable." *Id.* When viewed in its factual context, the court held the display of the cross violated the No Preference Clause of the California Constitution.

A more recent California case follows *Fox's* context specific approach. In *Okrand*, the court considered whether the display of an unlit menorah in the rotunda of the Los Angeles City Hall violated the No Preference Clause. 254 Cal. Rptr. at 921.

The *Okrand* court identified four circumstances which materially distinguished the menorah from the cross display in *Fox*. First, the *Okrand* display included religious symbols of comparable religious significance to other religions. *Id.* at 921. Second, the menorah was less conspicuous than the lighted, outdoor cross in *Fox*. *Id.* Third, a menorah is less religiously symbolic than a Latin cross. *Id.* at 922. Fourth, the Katowitz Menorah, which was crafted in a distinctive style and had been rescued from the Nazi Holocaust, had a "unique historical background [which rendered it] . . . much more a museum piece than a symbol of religious worship." *Id.* Based on these factors, the *Okrand* court concluded "that in the context in which it allowed the Katowitz Menorah to be displayed, the city exhibited no preference for the Jewish religion nor promoted it." *Id.*

We have also had occasion to interpret California's No Preference Clause. In *Hewitt*, we considered whether San Bernardino County's ownership and maintenance of a public park that contained religious statutes [sic] violated the California Constitution.

Analyzing California case law, we interpreted *Fox* and *Okrand* to stand for the proposition that "not only may a government body not prefer one religion over another, it may not *appear* to be acting preferentially." 940

F.2d at 1567. We then applied this standard to the historical and physical context surrounding the County park.

San Bernardino county, after taking ownership of the park, had dedicated it "Desert Christ Park," and "printed brochures which identif[ied] each of the statuary scenes by reference to Bible passages." *Id.* at 1563. This official brochure also described the statuary located on church property adjoining the park, and described these statues as being part of the park. Indeed, the largest of the park's statues, the Last Supper, straddled the property line of the church and the park.

Given these facts, we found "[t]he effect and message of the park is a religious one." *Id.* at 1568. Viewing the historical and physical context of the park as a whole, we held the County's ownership of the park "depicts a government-endorsement of the Christian faith" in violation of article I, section 4 of the California Constitution. *Id.* at 1569.

[2] Various factors can be distilled from *Fox*, *Okrand*, and *Hewitt* that are relevant to determining whether, when viewed in its historical and physical context, a given display on public property violates the California Constitution. These factors include 1) the religious significance of the display, 2) the size and visibility of the display, 3) the inclusion of other religious symbols, 4) the historical background of the display, and 5) the proximity of the display to government buildings or religious facilities.

A. The Mt. Helix Cross

1. Public Property

As a threshold consideration, we must determine if the display is on public property. When the district court issued its order in this case, the Mt. Helix Cross stood on land which the Yawkeys had conveyed to the County for the use and benefit of the public.[4] The County argues that the private funds which built and maintain the cross mute any message of governmental involvement; the Yawkey family built the cross on their property, set up a trust fund to be used for its maintenance, and established as a trust condition the establishment of an annual Easter sunrise service.

[3] Had the Yawkeys kept the land as private property, there would be no issue, no question of government involvement. However, they transferred the cross and surrounding land to the County. Pursuant to the conditions of the transfer, the County maintains the park and acts as trustee, responsible for fulfilling the terms of the trust document. As with the religious statuary in *Hewitt*, prior construction with private funds does not negate the message of subsequent maintenance on public land.

The County points out that removing the cross might trigger the reversionary clause in the deed that conveyed the park to the County. Reversionary clauses, however, are hidden from the public view and cannot themselves mitigate an appearance of religious preference. Whatever

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[4] Since this time, the County has conveyed the cross and a small piece of land upon which the cross stands to a private organization.

the effect of our decision today on the ultimate disposition of the cross and the surrounding property, such considerations are irrelevant to determining whether public involvement with the cross, as it stands, violates the No Preference Clause of the California Constitution.

For the same reason, the fact that the cross also serves as a navigational aid, or stands as a prominent landmark and tourist attraction, does nothing to ameliorate a violation of article I, section 4. If anything, such facts underscore the formidable nature of the display and increase the likelihood of an impermissible appearance of religious preference.

2. Religious Significance

The displayed item in this case, as in *Fox*, is a Latin cross. Appellants argue that the cross has been secularized to the point that it now functions as a general, secular memorial.

[4] The Supreme Court of California has held that the Latin cross carries a greater degree of religious significance than Santa Claus or the Easter Bunny. *See Fox*, 587 P.2d at 666 ("Easter crosses differ from Easter bunnies, just as Christmas crosses differ from Christmas trees and Santa Claus."). Indeed, the Latin cross "is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity." *Okrand*, 254 Cal. Rptr. at 922. This symbolism is evidenced by the cross' use as a backdrop for Christian celebrations such as baptisms, weddings, and Easter sunrise services.

We find unpersuasive the fact that the cross was built and dedicated as a memorial to a private individual before being conveyed, in trust, nevertheless, to the County. This alone cannot transform the cross into a secular memorial. As the plaintiff's counsel observed, "[t]he people who go to Mt. Helix for annual Easter services are there to commemorate Jesus Christ, not Mary Yawkey."

3. Size and Visibility

[5] The district court found that the religious symbolism of the Mt. Helix Cross is further amplified by its sheer size and visibility. Indeed, the 36-foot cross stands alone at the summit of a high hill and is illuminated nightly. It dominates the area, as did the statues in *Hewitt*. *See Hewitt*, 940 F.2d at 1568.

4. Inclusion of Other Religious Symbols

[6] The Mt. Helix Nature Theatre includes no other religious symbols. Indeed, the deed itself prohibits the display of any other religious symbols. Thus, the appearance of preference is not neutralized, as it was in *Okrand*, by the inclusion of symbols associated with other religions. *Okrand*, 254 Cal. Rptr. at 918 (display with menorah included, among other objects, a Christmas tree).

The County urges us to look at the entire park system for representation of other religions. The County points specifically to San Diego's first synagogue, Temple Beth Israel, a designated historic site and part of a county park. Although this speaks to an inclusive approach by

the park system as a whole, it does nothing to ameliorate the appearance of preference in this particular park. The California courts have not looked beyond the immediate area of the display in determining whether other religions are sufficiently represented. We also decline to do so.

5. Historical Significance

[7] The cross atop Mt. Helix has stood there since the 1920's as a prominent county fixture associated with an annual Easter sunrise service. Article I, section 4, however, requires more than mere longevity; a display's historical significance must be independent of the display's religious content. Even a purely religious symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events. In *Okrand,* for instance, the Menorah had been saved from the Holocaust and was "much more a museum piece than a symbol of religious worship." *Okrand,* 254 Cal. Rptr. at 922.

[8] In this case, the County provides no historically significant facts independent of the cross' inherently religious nature. Indeed, it appears the most historically significant aspect of the cross is its long-standing use as the site of annual Easter services. This kind of historical significance simply exacerbates the appearance of governmental preference for a particular religion.

6. Location

The Mt. Helix Cross is not located on an explicit government edifice as were the city hall displays challenged in *Fox* and *Okrand.* Moreover, this cross is not

associated with neighboring church property, as was the statuary in *Hewitt*.

[9] The mere fact that the display stands on public property is not enough to call into play the particular locational concerns of *Fox* and *Okrand*. In those cases it was the conjunction of religious symbolism with the institutions of government that enhanced the appearance of government endorsement of religion.

[10] No one factor, however, necessarily produces or prevents an appearance of religious preference. The court must look to the particular facts in each case in order to determine if the No Preference Clause has been violated. In this case, the size and religious significance of the cross, along with the lack of other religious symbols or independent historical significance, creates an appearance of religious preference. This is so despite the cross' distance from city hall.[5]

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[5] We note that the district court for Northern California has recently held a cross similar to the one in this case does *not* violate the No Preference Clause of the California Constitution. *See Carpenter v. City and County of San Francisco*, 803 F. Supp. 337 (N.D. Cal. 1992). The different result in *Carpenter* highlights the fact-based contextual inquiry required by these kinds of cases.

In *Carpenter*, the district court found the cross was located in a remote place, was only partially visible on a clear day, did not dominate the horizon when it could be seen, and could not be seen at all at night. *Id.* at 341. As we have already noted, the Mt. Helix Cross can be seen from a substantial distance and sits alone atop one of the highest hills in San Diego County. Moreover, unlike the present case, the cross in *Carpenter* was shown to have independent historical significance. *Id.* at 348.

B. The Mt. Soledad Cross

The Mt. Soledad Cross suffers from the same constitutional infirmities as does the Mt. Helix Cross. Accordingly, we summarize those infirmities while focusing on the ways in which the City of San Diego asserts the cross on this hilltop is different from the one atop Mt. Helix.

[11] As discussed above, the Latin cross is the preeminent symbol of Christianity. As was the case with the Mt. Helix Cross, this symbolism is further evidenced by its use as a backdrop for Christian celebrations such as baptisms, weddings, and Easter sunrise services. As was also the case with the Mt. Helix Cross, the Mt. Soledad Cross stands as the focal point of the park, visible to those looking at the hill from a substantial distance.[6] Finally, we note that the city park which contains the cross does not include comparable symbols of other religions to moderate the cross' sectarian message.

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[6] In its order, the district court noted that the cross' "commanding presence *and nightly illumination* at the very summit of Mt. Soledad render it the focal point of the public park in which it stands – so much so that it may be said, as between the Latin cross and the park, it is not clear which is meant to adorn which." (emphasis added).

All parties agree that the cross is not now illuminated. The city argues that the court's erroneous factual determination formed a core of its ruling, thus mandating reversal and remand. We disagree. The district court elaborated many reasons for the cross' prominence; lighting was just one of them. Lighted or not, the cross has, in the district court's words, a "commanding presence."

The historic background of this cross differs from the Mt. Helix Cross. Since 1913, a cross has stood on public property in the area where the Mt. Soledad Cross now stands. Built in 1954, the current cross was dedicated to veterans of World Wars I & II and the Korean War. According to the city, the cross has taken on a secular commemorative meaning as a veterans memorial and historical landmark.

The district court considered this argument and concluded that "the evidence indicates that the city's purported commemorative object is a pretext." The 1913 and 1934 crosses had no memorial associations. The current cross was dedicated on Easter morning in a Christian religious ceremony, even though Memorial Day falls not long after Easter.

The City and the Association challenge the court's identification of this Easter dedication as the only occasion before the filing of this lawsuit at which the cross site has ever been recognized as a war memorial. In support of this claim, the City and the Association have submitted for our consideration documents which suggest the American Legion identified the cross as a war memorial and considered installing a commemorative plaque. The documents also include several newspaper articles, particularly from the 1950's, which refer to the site as a war memorial and indicate that at least two ceremonies honoring veterans took place at the site in the decades before this suit was filed. Finally, the articles suggest that the Easter services have included memorial aspects. For example, in past services organizers stood empty mortar shells at either side of the podium and

representatives from military organizations took part in the celebration.

[12] We note as an initial matter that these documents were not before the district court and therefore cannot be considered part of the record on appeal. However, even if we were to agree that the cross has always been explicitly recognized and referred to as a war memorial, that would not obviate the appearance of preference.

A sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion. *See Jewish War Veterans of the United States v. United States*, 695 F. Supp. 1, 14-15 (D.D.C. 1987) (court ruling that a cross, "[t]he principal symbol of Christianity, this nation's dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message."); *Greater Houston Chapter of ACLU v. Eckels*, 589 F. Supp. 222, 235 (S.D. Tex. 1984) ("[E]ven if one strains to view the [cross] in the context of a war memorial, [its] primary effect is to give the impression that only Christians . . . are being honored."), *appeal dismissed*, 755 F.2d 426 (5th Cir.), *cert. denied*, 474 U.S. 980 (1985). *But cf. Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 346 (Or. 1976) (en banc) (display of a large cross in a public park as a veterans war memorial does not violate federal Constitution), *cert. denied*, 434 U.S. 876 (1977).

[13] While not commenting on whether such memorials violate the federal Constitution, we hold that the mere designation of a display as a "war memorial" is not enough to satisfy the more separationist No Preference

Clause of the California Constitution. *See Hewitt*, 940 F.2d at 567 (noting that religion clauses of California Constitution are read more broadly than their counterparts in the federal Constitution).

C. The La Mesa Insignia

[14] The district court accepted as reasonable the City of La Mesa's explanation that "the cross on the city's insignia is intended to represent a well-known local feature identifiable with La Mesa and, in so doing, to render the city's property and personnel more readily identifiable." We also accept this as the purpose for adoption of the insignia. This secular purpose does not, however, lessen the preference the insignia exhibits for Christianity.

[15] The cross is the focal point of this insignia. It is larger than it would be if drawn to scale, and it occupies the center of the design. Although the insignia also includes clouds and hills, the cross stands out. Whatever the intent, the insignia's design draws particular attention to the cross.

[16] The use of the insignia is particularly troubling. It is attached to uniforms, included on official correspondence, and prominently displayed on police motor vehicles. A design that focuses attention on the cross, when affixed to the uniforms of government officials, creates the appearance of religious preference. We do not hold that any depiction of a cross on an official insignia in California violates the No Preference Clause; we hold only that this particular design violates article I, section 4.

IV

Pursuant to its holding, the district court issued a permanent injunction "forbidding the permanent presence of each cross on the public property or imprimatur where it currently appears." The court further granted the defendants three months "within which to comply with its order." The court did not state what actions the defendants must take in order to comply with the injunction.[7] Following the issuance of that injunction, various actions have been taken which implicate the present and future status of the Mt. Soledad and Mt. Helix crosses.

On February 24, 1992, the City of San Diego voted to authorize the sale of a 15-foot square parcel of land underneath the Mt. Soledad Cross to the Mt. Soledad Memorial Association for $14,500. On June 2, the voters authorized the sale. This sale, however, has not yet taken place.

On February 25, San Diego County voted to give the San Diego Historical Society the Mt. Helix Cross and a 30-foot diameter parcel of land beneath the cross. This transfer has been effected.

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[7] The district court did give some indication of what it believed were alternative methods of complying with its judgment. Addressing the relevance of the costs the County will incur should the existence of the Mt. Helix Cross on public property be found unconstitutional, the court held that "the economic expense of removing the cross, of rendering non-public the property on which the cross stands or of otherwise attempting to cure the present infirmity may not bear on the constitutional challenge presently before the court." *Murphy v. Bilbray*, 782 F. Supp. 1420, 1433-34 (S.D. Cal. 1991).

The plaintiffs, in supplemental briefing, argue that both the authorized and completed transfers violate the state and federal constitutions and constitute a bad-faith and illegal end-run around the district court's order. The plaintiffs urge us to resolve the issues. We decline to do so.

These questions relate not to the validity of the injunction before us for review, but to how compliance with that injunction may be effected. Any issues concerning compliance with the injunction should be decided in the first instance by the district court.

AFFIRMED

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ELLIS, Plaintiff-Appellee, v. CITY OF LA MESA, et al., Defendants-Appellants.	No. 92-55086 D.C. No. CV-90-0135-GT(P) No. 92-55087 D.C. No. CV-89-0820-GT
PHILIP PAULSON, HOWARD T. KREISNER & SOCIETY OF SEPARATIONISTS, INC., Plaintiffs-Appellees, v. THE CITY OF SAN DIEGO, Defendant-Appellant.	No. 92-55093 D.C. No. CV-90-0134-GT ORDER (Filed March 26, 1993)
JOHN MURPHY, Plaintiff-Appellee, v. BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS, and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and THE COUNTY OF SAN DIEGO, Defendants-Appellants.	

(Filed: March 26, 1993)

Before: TANG, SCHROEDER, and BEEZER, Circuit Judges

The opinion filed March 23, 1993 inadvertently omitted the attached separate concurrence.

Ellis v. City of La Mesa, Nos. 92-55086/55087/55093

BEEZER, Circuit Judge, specially concurring:

(Filed March 23, 1993)

The writer of the court's opinion deems it necessary to complete the record in order to point out why, in writing for the court, he said nothing about the injunctive relief contained in the district court's summary judgment order.

The district court correctly declared that the permanent presence of the disputed crosses on public property violates the No Preference Clause of the California Constitution. However, San Diego County claims that the Mt. Helix Cross has been transferred to the San Diego Historical Society. Likewise, the City of San Diego claims it is authorized to transfer the Mt. Soledad Cross. The plaintiffs claim that both actions thwart the injunctive relief granted by the district court.

These matters involve enforcement of the injunction and must first be considered by the district court. The district court, however, did not explicitly state the manner in which its injunction was to be enforced.[1] Given their dissatisfaction with the property transfers, one can suppose the plaintiffs will call upon the district court to

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[1] *See ante*, at note 7.

enforce the injunction by requiring the removal or destruction of the crosses. Destruction of the crosses, however, raises as many issues as it resolves.

A. The Mt. Helix Cross Conveyance

The original 1929 Yawkey deed that conveyed the land and the Mt. Helix Cross to the County contained a reversionary clause.[2] No Yawkey heirs were made party to this action in the district court.[3] As noted above, the County claims to have conveyed title to the Mt. Helix Cross and a thirty-foot diameter circle of land beneath it to the San Diego Historical Society. The validity of this conveyance raises a variety of issues involving California property and trust law.

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[2] The clause reads as follows:

> AND IT IS FURTHER PROVIDED, That . . . should [the County] . . . convey, or attempt to convey . . . said premises herein conveyed, or any part or parcel thereof, . . . to any person, firm association, organization, or corporation, . . . then and in that event, the said premises, and the whole thereof, and said fund and/or funds, and the whole thereof, . . . shall forthwith revert to, and the title thereof and thereto vest in, and the whole thereof become the property of the trustor herein, his heirs and assigns, and the heirs and assigns of . . . MARY YAWKEY WHITE, Deceased, as fully as if these presents had never been executed.

[3] The district court explicitly declined to address the reversionary interest issue. *Murphy*, 782 F.Supp. at 1434 n.36 ("The present lawsuit poses constitutional issues only. It does not provide a sufficient legal or evidentiary basis from which to rule on the sufficiency and application of the deed's reversionary clause.").

As an initial matter, it is unclear whether the County validly took title of the land in the first place. A municipal corporation cannot ordinarily act as trustee of property to be devoted solely to religious uses. *See* Eugene McQuillin, 10 *The Law of Municipal Corporations*, § 28.31 (3rd ed. 1990). If the County cannot act as trustee under the Mt. Helix conveyance, then either the reversionary clause of the conveyance applies, or the court may prevent the trust from failing by appointing a private trustee. *See id.* at § 28.36.

The reverter clause may no longer be applicable.[4] However, the plaintiffs concede that the Yawkey heirs may have an interest if 1) the court finds the original deed created a charitable trust and 2) the actions taken by the County are determined to have caused such trust to fail.[5]

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[4] The County argues that, under the Marketable Record Title Act, Cal. Civil Code §§ 885.010, 885.020 (1982), the power of termination expired unless the a notice of intent to preserve the power to terminate was recorded within five years after the operative date of the Act. *See id.* at §§ 880.030, 885.370. I express no opinion on whether the power to terminate has in fact expired.

[5] Where property is given in trust, but the trust fails for some reason, a resulting trust arises in favor of the grantor or his successors. Witkin, *Summary of California Law*, "Trusts" § 298 (9th ed. 1990); *Restatement (Second) of Trusts* § 335. *See e.g. Evans v. Newton*, 148 S.E.2d 329 (Ga. 1966), *aff'd sub nom, Evans v. Abney*, 396 U.S. 435 (1970) (where sole purpose for which the trust had been created had become impossible of accomplishment, the charitable trust has been terminated and a resulting trust is implied for the benefit of the grantor or his heirs).

Although the district court noted that "San Diego County is the trustee" of the "funds left in trust . . . for the purpose of maintaining the Mt. Helix Nature Theatre,"[6] the court did not determine whether the real property itself is held by the County in trust. A number of issues, then, have yet to be resolved. These include determining whether a trust exists, who are the interested parties under that trust, the existence and effect of the reversionary clause, and what effect the County's transfer has on the trust.

The injunction forbids "the permanent presence of each cross on the public property . . . where it appears," and gives the defendants three months to comply with the court's order.[7] It seems to me there are but two ways to comply with this order; the County must either transfer the land or destroy the crosses. Both alternatives implicate the rights of parties not before the court and involve issues undecided by the court. Before the County may transfer the land, it must have title to the land. As noted above, there has been no determination that the initial conveyance to the County was valid in the first place. For similar reasons, the County cannot remove the crosses without potentially violating the property rights of the Heirs of Yawkey who may have legal title to both

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[6] *Murphy*, 782 F. Supp. at 1423 n.8.

[7] It should be noted that stays have been issued pending the outcome of this appeal. *See Paulson v. City of San Diego*, No. 92-55087 (9th Cir. April 1, 1992) (*en banc*); *Ellis v. City of La Mesa*, No. 92-55086 (9th Cir. Mar. 19, 1992); *Murphy v. Bilbray*, No. 92-55093 (9th Cir. Mar. 19, 1992). These stays will remain in effect until the mandate of this court issues, usually twenty-one days after this opinion is filed. *See* Fed. R. App. P. 41(a).

the land and the cross. If enforcement proceedings are initiated in the district court, questions of California property law and the joinder of interested parties will undoubtedly be at issue.[8]

B. The Mt. Soledad Cross

The voter authorization to transfer ownership of Mt. Soledad Cross has no effect on the court's determination today that the status quo violates the California Constitution. As the opinion points out, a challenge to any future transfer should be brought first before the district court.

A more difficult question is whether all parties who have a legal interest in the Mt. Soledad Cross were before the district court when it issued its injunction. The City argues that the Mt. Soledad Cross is owned by the Mt. Soledad Memorial Association and that the interests of the Association were not considered by the district court. According to the City, removing the cross would violate the Association's property rights under state and federal law. Plaintiffs argue that the Association has no legal interest in this litigation because the cross was given to the City as a gift.

Under Federal Rule of Civil Procedure 19(a), a just adjudication requires, if feasible, the joinder of those parties that have "a legally cognizable interest in the suit,

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[8] It bears pointing out that, along with any Yawkey heirs, the interests of the San Diego Historical Society should be considered on remand. As the current holders of colorable title to both the cross and the surrounding land, the Society clearly has an interest in the outcome of this litigation.

and [whose] interest will be impaired or impeded by the suit. . . . " *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-59 (9th Cir. 1990). *See also Shimkus v. Gerten Companies*, 816 F.2d 1318, 1322 (9th Cir. 1987) (the need to consider the interests of third parties, and to do so in the same litigation, favors a decision to require joinder).

In this case, absent a finding by the district court as to who actually owns the cross, it remains unclear whether all "interested parties" were before the district court when it issued its injunction. As with the Mt. Helix Cross, this is a question of state law and may require the joinder of additional interested parties.

When the mandate issues, proceedings to enforce the injunction may be initiated in the district court. The district court, of course, has continuing power to modify or vacate its decree. *See System Fed'n No. 91, Ry. Employes'* [sic] *Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961) ("There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.") *See also* 11 Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2961 (1973) (noting the "universally recognized principle that a court has continuing power to modify or vacate a final decree"). Upon hearing the claims of the parties, the district court will be able to modify, fashion or enforce appropriate equitable relief as the constitutional and property interests of the respective parties may be determined.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ELLIS, Plaintiff-Appellee, v. CITY OF LA MESA, et al., Defendants-Appellants.	No. 92-55086 No. 92-55087
PHILIP PAULSON, HOWARD T. KREISNER & SOCIETY OF SEPARATIONISTS, INC., Plaintiffs-Appellees, v. THE CITY OF SAN DIEGO, Defendants-Appellant.	No. 92-55093 ORDER (Filed June 23, 1992)
JOHN MURPHY, Plaintiff-Appellee, v. BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS, and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and THE COUNTY OF SAN DIEGO, Defendants-Appellants.	

Before: TANG, SCHROEDER, and BEEZER, Circuit Judges

Submission of these consolidated cases is withdrawn. Four parties are requested to file supplemental briefs.

The City of San Diego, as appellant in cause No. 92-55087, is requested to address the following issues:

(1) Whether the interests of the Soledad Memorial Association have been adequately considered by the district court.

(2) Whether title to the land supporting the cross has been conveyed and, if so, whether this appeal is moot.

(3) Whether the interests in real estate supporting the cross can be severed, and if so, will the conveyance of such land by a municipal corporation to private parties violate California statutory or constitutional law.

(4) Whether disputed facts remain requiring a trial.

The County of San Diego, as appellant in cause No. 92-55093, is requested to address the following issues:

(1) Whether the interests of the grantor's heirs have been adequately considered by the district court.

(2) Whether title to the land supporting the cross has been conveyed and, if so, whether this appeal is moot.

(3) Whether, under the facts of this case, conveyance to private parties of all or part of dedicated park land held in trust violates California trust, statutory or constitutional law.

(4) Whether, under the facts of this case, appointment of a successor, non-governmental trustee would be a feasible remedy.

(5) Whether disputed facts remain requiring a trial.

The briefs of the City of San Diego and the County of San Diego shall not exceed 15 pages each. These briefs shall be served and filed on or before 14 days from the date that this order is filed. The plaintiffs-appellees in the two causes each are requested to file an answering brief, which shall not exceed 15 pages. These briefs shall be served and filed on or before 28 days from the date that this order is filed. Further briefs from other parties or from amicus curiae are not requested and the clerk of this court shall not file such briefs.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN MURPHY, Plaintiff-Appellee, -vs- BRIAN BILBRAY, et al, Defendants-Appellants.	)	No. 92-55093 D.C. No. CV-90-0134-GT ORDER (Filed Mar. 26, 1992)

Before: WALLACE, Chief Judge, BROWNING, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, D.W. NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ, RYMER, T.G. NELSON, and KLEINFELD, Circuit Judges.

The petition for emergency rehearing of petitioner's motion for stay and suggestion for rehearing en banc in *Murphy v. Bilbray, et al.*, No. 92-55093, has been withdrawn. Therefore, the court will not vote on the suggestion for rehearing en banc.

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MURPHY,

Plaintiff-Appellee,

v.

BRIAN BILBRAY, in his official capacity as member of San Diego County Board of Supervisors; GEORGE BAILEY, in his official capacity as member of San Diego County Board of Supervisors; LEON L. WILLIAMS, in his official capacity as member of San Diego County Board of Supervisors; SUSAN GOLDING, in her official capacity as member of San Diego County Board of Supervisors; JOHN MACDONALD, in his official capacity as member of San Diego Board of Supervisors; and COUNTY OF SAN DIEGO,

Defendants-Appellants.

No. 92-55093

D.C. No. CV-90-0134-GT (Southern California)

ORDER

(Filed Mar. 19, 1992)

This case has now been referred to a merits panel. The injunction issued by the district court is hereby stayed pending appeal or further order of the court.

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

/s/ _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ELLIS, Plaintiff-Appellee, vs. CITY OF LA MESA, a Municipal Corporation, et al., Defendants-Appellants.	No. 92-55086 DC# CV-90-0135-GT Southern California
PHILIP K. PAULSON, et al., Plaintiffs-Appellees, vs. THE CITY OF SAN DIEGO, Defendant-Appellant.	No. 92-55087 DC# CV-89-0820-GT Southern California
JOHN MURPHY, Plaintiff-Appellee, vs. BRIAN BILBRAY, in his official capacity as member of San Diego County Board of Supervisors, et al., Defendants-Appellants.	No. 92-55093 DC# CV-90-0134-GT Southern California ORDER (Filed Feb. 21, 1992)

Before: NORRIS, CANBY and LEAVY, Circuit Judges

The December 3, 1991, order of the district court is temporarily stayed pending an en banc vote on the denial of the stay pending appeal. This temporary stay is to remain in effect until the announcement by the court of the results of the en banc vote.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MURPHY, Plaintiff-Appellee, vs. BRIAN BILBRAY, in his official capacity as member of San Diego County Board of Supervisors, et al., Defendants-Appellants.	No. 92-55093 DC# CV-90-0134-GT Southern California ORDER (Filed Feb. 13, 1992)

Before: NORRIS, CANBY and LEAVY, Circuit Judges

Appellants' motion to stay the district court's December 3, 1991 order pending appeal is denied. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds*, 463 U.S. 1328, 464 U.S. 879 (1983).

This appeal will be considered on an expedited basis. The appeal is released from the pre-briefing conference program. Appellants shall take the steps necessary to secure the filing of the certificate of record on or before March 3, 1992. Appellants' opening brief is due March 3, 1992. Appellee's brief is due March 24, 1992.

The Clerk shall calendar this appeal for argument in Pasadena during the week of May 4, 1992. The appeal shall be assigned to the same panel which hears *Paulson v. San Diego*, appeal no. 92-55087 and *Ellis v. La Mesa*, appeal no. 92-55086.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN MURPHY,

Plaintiff,

v.

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS AND JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and the COUNTY OF SAN DIEGO,

Defendants.

ORDER

(Filed Dec. 3, 1991)

Civ. No. 90-0134 GT

PHILIP K. PAULSON, HOWARD KREISNER and THE SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs,

v.

CITY OF SAN DIEGO, CALIFORNIA,

Defendant.

Civ. No. 90-0820 GT

JAMES ELLIS,

Plaintiff,

v.

CITY OF LA MESA, et al.,

Defendant.

Civ. No. 90-0135 GT

Before the court are 3 consolidated cases, each of which challenges the constitutionality of a local municipality's conduct with respect to the so-called "Latin cross." The Latin cross is a cross the stem of which is longer than its three other arms. One such cross, the Mt. Helix cross, is located in a municipal park in San Diego County. A second, the Mt. Soledad cross, is located in a municipal park in the City of San Diego. A third such cross is depicted on the official insignia of the City of La Mesa, which is located in San Diego County. Plaintiffs contend that the government's acquiescence in the presence and disposition of the first two Latin crosses in public parks and in the depiction of the third Latin cross on a public imprimatur violate the constitutions both of the state of California and of the United States.

The opinion addressed all three challenges. It proceeds first with an exposition of the facts relevant to each of the three challenges, then with a discussion of whether each plaintiff is entitled to sue, and finally with a discussion of the constitutional issues and how they bear on each challenge.

Because these challenges come before the court at the summary judgment stage of litigation, the court is required in its analysis of defendants' motions to interpret all evidence and justifiable inferences in the light most favorable to plaintiffs. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Conversely, the court is required in its analysis of plaintiffs' motions to consider all evidence and justifiable inferences in the light most favorable to defendants. As the material facts in all three cases appear not to be in dispute, the court shall consider

them identically as to both plaintiffs and defendants and shall rule on the parties' motions as a matter of law.[1]

I.

FACTS

A. The Mt. Helix and Mt. Soledad Crosses

The Mt. Soledad and Mt. Helix Latin crosses are substantially similar. Both stand in excess of 35 feet tall.[2] Both are illuminated nightly. Each is erected in, and is a prominent feature of a publicly-owned park.[3] The parks in which the crosses stand are located atop two of the

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[1] "It is well-settled that whether a government display violates the first amendment is indeed a question of law." *Harris v. City of Zion*, 927 F.2d 1401, 1402 n.1 (7th Cir. 1991) (citing cases). *see also id.* at 1407-1409.

[2] The Mt. Helix Latin cross is 36 feet tall. It is constructed with concrete.

The Mt. Soledad Latin cross is 43 feet tall. It is constructed with reinforced concrete and weighs approximately 24 tons.

[3] The Mt. Helix Latin cross is located in the Mt. Helix Nature Theatre, a 3-4 acre park which has been owned by the defendant San Diego County since 1929, when it was deeded to the County in trust by Cyrus Carpenter Yawkey.

The Mt. Soledad Latin cross is located in the Mt. Soledad Nature Park, a 170-acre park situated on land which has belonged to the defendant City of San Diego since the nineteenth century. The city council dedicated this property as a public park in 1916.

highest knolls in San Diego County.[4] So situated, each cross can be seen from a substantial distance.[5]

Each of the two crosses has stood for a substantial number of years where it currently stands.[6]

Neither cross was erected with public funds,[7] and each is the object of a private fund intended to provide

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[4] Mt. Helix is located in the La Mesa area of San Diego County. Mt. Soledad is located in the La Jolla area of the City of San Diego.

[5] The Mt. Helix Latin cross is visible from the town of La Mesa and its vicinity.

The Mt. Soledad Latin Cross is visible from several miles away, including from Interstate 5, a public freeway which passes within 1/2 mile of Mt. Soledad Nature Park.

[6] The Mt. Helix Latin cross evidently has stood where it now stands since 1925, four years before Cyrus Carpenter Yawkey deeded it, along with the rest of Mt. Helix Nature Theatre, to San Diego County.

The Mt. Soledad Latin cross has stood where it now stands since 1954; however, it is not the first Latin cross to have been erected atop Mt. Soledad. The first known such cross was constructed of redwood and placed on Mt. Soledad by private citizens in 1913. Destroyed by vandalism in 1923, it was replaced with a wood and stucco cross in 1934. The 1934 cross was subsequently destroyed in 1952. The current cross replaced it.

[7] Cyrus Carpenter Yawkey and Mary Yawkey White supervised and paid for the erection of the Mt. Helix Latin Cross sometime before 1929, when Mr. Yawkey deeded it, along with the rest of the Mt. Helix Nature Theatre, to San Diego County.

As for the Mt. Soledad Latin cross, the San Diego City Council granted permission in 1952 to the Mt. Soledad Memorial Association to reconstruct a Latin cross on Mt. Soledad. The

for its maintenance.[8] Nevertheless, it appears that a small amount of public funds has also been expended for the maintenance of each.[9]

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association then solicited private contributions and, without public funding, supervised and paid for the erection of the Latin cross currently atop Mt. Soledad.

[8] The Mt. Helix Latin cross is maintained with funds left in trust by Cyrus Carpenter Yawkey for the purpose of maintaining the Mt. Helix Nature Theatre. San Diego County is the trustee.

The Mt. Soledad Latin cross is maintained by the Mt. Soledad Memorial Association. The source of funds and labor for the Association's maintenance of the cross is not clear.

The public parks in which both crosses are located are maintained with public (and, in the case of Mt. Helix, some private) funds; only the crosses themselves are privately maintained.

[9] Proceeds from the Mt. Helix Nature Theatre's trust fund, the corpus of which is $30,000, appear to be sufficient to fund maintenance of the Mt. Helix Latin cross. These funds have also been used in order to maintain other parts of the Theater. Nevertheless, three circumstances are of note: First, until two years ago San Diego County paid for the electricity used to illuminate the cross. Given the magnitude of the trust fund, this figure may well be easily recompensable by the trust. Second, the terms of the trust require the trustee, San Diego County, to apply trust funds to the annual Easter sunrise service atop Mt. Helix; each year the trust contributes approximately $300. Third, the trust fund is administered by county employees who draw salaries from the County; neither these employees nor the County are compensated by the trust.

As for the Mt. Soledad Latin cross, in 1984 a painting supervisor with the City of San Diego's Building Maintenance Department paid a contractor $1,750.00 to repaint the cross. The supervisor had not been made aware that such maintenance was the responsibility of the Mt. Soledad Memorial Association. The appropriate city departments have since been informed.

Roles both religious and secular have been ascribed to each cross. Each has on occasion been used by members of the public for Christian religious purposes.[10] Each cross also has been dedicated as a memorial to an individual or individuals who have died.[11] In addition, the

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[10] The Mt. Helix Latin cross has served as the site of numerous weddings and of an annual Easter Sunday sunrise service. In fact, the deed conveying the entire Mt. Helix Nature Theatre conditions the County's title on the annual holding of an Easter sunrise service "suitable for commemorating the resurrection of the Lord Jesus Christ, as taught by the Christian churches of the world." The terms of that deed also require that the cross be illuminated each year from Christmas Eve until New Year's Eve and on the evening before Easter day (as well as on the evenings of Thanksgiving, Mother's Day, and the grantor's and his sister's birthdays.) The County elects to illuminate the cross every night of the year.

The Mt. Soledad Latin cross was dedicated in a Christian religious ceremony on Easter Sunday, 1954. Since that time, the City of San Diego has granted the Mt. Soledad Memorial Association a permit each year to conduct a sunrise service on Easter morning. No record exists of the Association's ever having submitted an application to conduct ceremonies on Memorial Day or Veterans Day. Like the Mt. Helix Latin cross, the Mt. Soledad cross has served as the site of numerous weddings. It also has served as the site of several baptisms.

[11] The Mt. Helix Latin cross was originally erected by Cyrus Carpenter Yawkey and Mary Yawkey White to the memory of their deceased mother, Mary Carpenter Yawkey. The deed by which Mr. Yawkey conveyed Mt. Helix Nature Theatre to San

cross on Mt. Helix serves pilots as a navigational aid, and the cross on Mt. Soledad assists surveyors and seismologists.[12]

Diego County indicates that installed near the cross at that time was a plaque which read as follows:

MOUNT HELIX
NATURE THEATRE
FOR THE INSPIRATION AND USE
OF THE PEOPLE
LOVINGLY DEDICATED
TO THE MEMORY OF THEIR MOTHER
MARY CARPENTER YAWKEY
WHO LOVED THIS MOUNTAIN SUMMIT
AND THE INSPIRING VIEW
BY CYRUS CARPENTER YAWKEY
AND
MARY YAWKEY WHITE
EASTER 1925

At some time between 1929, when Mr. Yawkey deeded the park to the County, and 1990, when this lawsuit was instituted, vandals destroyed the memorial plaque. The court takes judicial notice that on November 20, 1990, one week after oral argument on this motion, the County replaced the memorial plaque with a replica of the original. *See* County of San Diego's Request for Judicial Notice, filed November 27, 1990.

On April 18, 1954 shortly after it had been erected, the Mt. Soledad Latin cross was dedicated as a tribute to veterans of World War I, World War II and the Korean War. In September 1989, several months after this suit against the City was filed, and thereafter, veterans' groups have conducted Prisoner of War/Missing in Action ceremonies in Mt. Soledad Nature Park.

[12] Mt. Helix is used as a landmark by pilots. It, but not the cross, is indicated on flight maps for navigational purposes.

The cross on Mt. Soledad has been used as a "geodetic marker" for survey and earth-quake monitoring purposes from as early as 1913 until today. It is the most important geodetic marker in San Diego County and is prominently identified in

While the two crosses clearly are alike in may respects, they also are distinguishable. In particular, it should be noted that whereas the property on which the Mt. Soledad Latin cross stands has been public for as long as the cross has stood there, the property on which the Mt. Helix Latin cross stands did not become public until *after* the cross had been erected on it.[13]

B. The La Mesa Insignia

The Latin cross at issue in the La Mesa case appears in an illustration on the city of La Mesa's official insignia. The illustration depicts several hills below two clouds. The cross is located at the center of the illustration, atop the highest hill and between the two clouds.[14] Plaintiff claims that the image formed by the cross, the hills and the clouds appears to him to be a depiction of Calvary. Defendant, the City of La Mesa, contends that the image is meant to depict Mt. Helix, which is a prominent local landmark. The insignia itself appears on police vehicles, on shoulder patches affixed to the uniforms of police, animal control and fire fighting personnel, and on official literature distributed by the city of La Mesa.

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the *Horizontal Control Data* published by the U.S. Department of Commerce Coast and Geodetic Survey (indicating "Easter Cross" on chart). *See* Defendants' Exhibit I-1.

[13] *See* above note 8.

[14] A photocopy of the La Mesa insignia appears in the Appendix to this opinion.

C. The Plaintiffs and the Injuries They Allege

John Murphy, sole plaintiff in the Mt. Helix case, is a Catholic, San Diego County resident and taxpayer who "is offended by the use of public property and the expenditure of public money to display and illuminate the cross on Mt. Helix." Complaint at 2. Although he "otherwise would visit the [Mt. Helix Nature] Theatre and take out-of-town guests there to enjoy the panoramic view it offers, [he instead] avoids visiting the Threatre because of [the presence of] the large cross." *Id.* at 2-3. *See also* Declaration of John Murphy, October 15, 1990 (Plaintiff's Exhibit 1), at 2.

Philip Paulson and Howard Kreisner, plaintiffs in the Mt. Soledad case, both are Viet Nam War combat veterans, avowed atheists and residents and taxpayers of the city of San Diego. Complaint at 2-3, 5-7. Both submit in their complaint that they are "deeply offended" by the presence of the cross on Mt. Soledad. *Id.* at 3. As soldiers they saw companions in arms who adhered to many different faiths fall in combat. *Id.* at 5-7. Having been unable to identify the occurrence of any commemorative activities at the site of the cross, they consider its characterization as a veterans memorial an "outrageous insult." *Id.* at 6-7. Both Paulson and Kreisner would like to visit Mt. Soledad in order to enjoy its spectacular view, but because the cross is there they instead avoid it. *Id.* at 5,7. As a result of the cross' presence, they feel they "are made to feel like outcasts and second-class citizens in their own home town." *Id.* at 8.

Their co-plaintiff, the Society of Separationists, is a Maryland corporation which is licensed to do business in

California and which includes them among its members. *Id.* at 3-4. It is a "nonprofit, nonpolitical, educational organization dedicated to the complete and absolute separation of state and religion/church . . . on behalf of its members and itself." *Id.* at 3.

James Ellis, sole plaintiff in the La Mesa insignia case, is a religious Episcopalian, La Mesa resident and taxpayer who is "deeply offended by the expenditure of taxes for insignias depicting a religious symbol." Complaint at 2-3. *See also* Declaration of James Ellis in Support of Plaintiff's Motion for Summary Judgment, October 15, 1990 (Plaintiff's Exhibit E), at 2. Because the insignia is prominently displayed on city vehicles and on official city mailings to residents, he is unable to avoid contact with it. *Id.* at 3. Mr. Ellis declares that lest the cross on the insignia offend business clients or embarrass himself, he has in the past declined to invite business clients to his home when, but for the presence of the cross on the insignia, he would have invited them. *Id.* at 2. Mr. Ellis is particularly troubled by the way in which the insignia associates Christianity with the police department. He believes that it "symbolically tells people who are Christians that they are welcome or favored . . . and . . . tells people who are not Christians that they are outsiders or less than welcome." *Id.* at 3.

II.

STANDING

Before this court can begin to consider any plaintiff's claim, it must first be satisfied that that plaintiff has standing to have his claim heard. That is, each plaintiff

must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). Plaintiffs may satisfy the injury requirement either by alleging a direct injury or by proving that they are municipal taxpayers objecting to municipal expenditures.[15]

The Supreme Court has made clear that *psychological* injury suffered by one who observes conduct with which he or she disagrees is insufficient to confer standing. *Valley Forge*, 454 U.S. at 485-87 (intensity of plaintiff's interest in the separation of church and state cannot substitute for requirement of injury in fact). Thus even if the crosses offend plaintiffs, that offense is insufficient to entitle them to maintain suit.

Notwithstanding the insufficiency of psychological injury, the Supreme Court has held that the required injury need not be severe and need not be economic.[16] An

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[15] Unlike federal and state taxpayers, "municipal taxpayers have traditionally been held to have standing to assert objections to municipal expenditures." *Grove v. Mead School Dist.*, 753 F.2d 1528, 1532 (9th Cir. 1985), *cert. denied* 474 U.S. 826 (1985) (doctrine of "taxpayer standing" applicable to federal Establishment Clause challenge).

[16] The Supreme Court has held that the "injury-in-fact" limitation on the jurisprudential requirement of standing should be interpreted so as to "distinguish a person with a direct stake in the outcome of litigation – even though small – from a person with a mere interest in the problem." *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 698 n.14 (1973) (citing cases) ("identifiable trifle" of

example of a non-economic injury which the Supreme Court has held confers standing is the deprivation of a citizen's beneficial use of a public park. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973) (claimed impediment to plaintiffs' recreational use of natural resources is sufficient to confer standing). The rationale for this holding is succinctly explained in *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir 1970), a District of Columbia case in which citizens challenged the display of a creche in a public park. In *Allen*,

> [g]overnment counsel put it at argument that if the plaintiffs didn't like to look at the creche, they could avoid walking near the Ellipse while it was occupied by the creche. [The Court of Appeals for the District of Columbia disagreed, however, and held that the p]laintiffs were entitled, as members of the public, to enjoy the park land and its devotion to permissible public use; *a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional.*

Allen, 424 F.2d at 947 (emphasis added) (footnotes omitted) (holding that standing existed);[17] *on remand sub nom.*

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injury is sufficient to confer standing) and accompanying text. Accordingly, a showing of slight, non-economic injury is sufficient to confer standing.

[17] *See also American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1105 (11th Cir. 1983) (per curiam) (standing existed where plaintiffs alleged that, but for presence of large Latin cross, they would use public park); *Valley Forge*, 454 U.S. at 487 n.22 (discussing *School District of*

Allen v. Morton, 333 F.Supp. 1088 (D. D.C. 1971) (holding no violation of federal Establishment Clause); *rev'd* 495 F.2d 65 (D.C. Cir. 1973).

Here, plaintiff in the Mt. Helix case and the individual plaintiffs in the Mt. Soledad case allege that the County's and the City's conduct – both in permitting the crosses to stand where they do and, allegedly, in acquiescing in the restrictive covenants associated with the Mt. Helix cross – inhibit the plaintiffs' use of a public park. Since the deprivation of a citizen's beneficial use of a public park is an injury sufficiently direct to confer standing, *see SCRAP*, 412 U.S. at 686, the standing requirement in the Mt. Helix and Mt. Soledad cases is met.

Plaintiff in the insignia case alleges that the inclusion of a cross on La Mesa's city insignia inhibits him from inviting clients to his home, thereby impeding the way he conducts his livelihood. However small it may be, this impediment to plaintiff's livelihood generates a stake in the disposition of the La Mesa cross which to this court appears no less direct than the stakes upheld in previous establishment clause challenges. *See, e.g., American Civil Liberties Union v. St. Charles (St. Charles)*, 794 F.2d 265 at 268-69 (detouring from customary route to avoid religious display is injury sufficient to confer standing), *cert.*

Abington Township v. Schempp, 374 U.S. 203 (1963) (standing existed because law required public school students to "assume special burdens" in order to be excused from mandatory bible reading requirement)); *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 268-269 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986).

denied, 479 U.S. 961 (1986); *Allen*, 424 F.2d at 947 (same).[18] Thus, the standing requirement in the La Mesa case also is met.

The standing requirement's having been met in all three cases, the court must proceed to consider the merits of each.[19]

III. CONSTITUTIONAL ISSUES

Each of the three cases presently before the court raises important issues under the constitutions both of the State of California and of the United States. Because the Ninth Circuit has held that "federal constitutional issues should be avoided even when the alternative ground is one of state constitutional law," *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-43 (9th Cir. 1985) (citations

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[18] In the words of the Seventh Circuit, "[i]t is the willingness of the plaintiffs to incur a tangible, albeit small cost that validates the existence of genuine distress and warrants the invocation of federal jurisdiction." *Harris*, 927 F.2d at 1406. *See also SCRAP*, 412 U.S. at 689 n.14 ("[a]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation") (cited in *Harris*, 927 F.2d at 1406).

[19] Since the court finds that at least one plaintiff in each case has standing, and since any one plaintiff's standing in each case will require the court to reach the merits of that case, the court need not address whether the Society of Separationists, co-plaintiff in the Mt. Soledad case, has standing.

In addition, since the court is satisfied that plaintiffs have alleged injuries sufficiently direct to confer standing, it need not assess plaintiffs' alternative claims of taxpayer standing. *See* above note 17.

omitted), this court turns its attention first to plaintiffs' state constitutional claims.

A review of all three cases reveals that the complaint in each alleges violations of three state constitutional provisions: first, the No Preference Clause of Article I, Section 4; second, the Establishment Clause of Article I, Section 4; and third, the Prohibition on Religious Appropriations Clause of Article XVI, Section 5, *See* Cal. Const. art. I, § 4 and art. XVI, § 5. Because the court holds today that the challenged practices in all three cases violate California's No Preference Clause, it is unnecessary to engage in further analysis under either the California or United States Constitutions.

A. California's No Preference Clause

Article I, Section 4 of the California Constitution provides that:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. The liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The legislature shall make no law respecting an establishment of religion.

Cal. Constn. art. I, § 4. The first sentence of this section comprises California's so-called No Preference Clause.

The Ninth Circuit, the interpretations of which this court is duty-bound to follow, recently considered the language of the No Preference Clause and the jurisprudence arising from it. *See Hewitt v. Joyner,* 940 F.2d 1561 (9th Cir. 1991). In so doing, the court relied principally on two California cases which, it stated, "define the state

constitutional limits on governmental-sponsored religious displays." *Id.* at 1567. The two cases are *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) and *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566 (2d Dist. 1989).

In *Fox*, plaintiffs challenged whether the City of Los Angeles could constitutionally light a cross on city hall during Christmas and Easter. The California Supreme Court, ruling on appeal, acknowledged that "[i]n the California Constitution there is no requirement that each religion always be represented." *Fox*, 22 Cal.3d at 797 (quoted in *Hewitt*, 940 F.2d at 1567). The Court further ruled, however, that "[t]o illuminate only the Latin cross- . . . does seem preferential when comparable recognition of religious symbols is impracticable." *Id.* (quoted in *Hewitt*, 940 F.2d at 1567). So ruling, the Court found in favor of plaintiffs and against the city. As stated subsequently by the Second District Court of Appeal, the city's conduct was unconstitutional because the city's "failure or inability to recognize the symbols or holidays of other religions showed a clear act of preference." *Okrand*, 207 Cal.App.3d at 579.

Thereafter in *Okrand*, the Second District considered the constitutionality of Los Angeles' display of another religious symbol: an unlit menorah, salvaged from the Holocaust and exhibited together with a Christmas tree in the city hall rotunda. Ruling on the constitutionality of the menorah display, the court held that "in the context in which it allowed the Katowitz Menorah to be displayed, the city exhibited no preference for the Jewish religion . . . " *Id.* at 579.

In so holding, the court expressly identified four circumstances which materially distinguished the display in *Okrand* from that in *Fox:* First, the *Okrand* display's menorah was less religiously symbolic than the Latin cross displayed in *Fox.*[20] Second, the *Okrand* menorah was considerably less conspicuous than the *Fox* cross.[21] Third,

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[20] The *Okrand* court stated that

> [t]he menorah . . . differs in degree from the Latin cross in terms of its significance as a symbol of religion. The cross is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity. The menorah's significance to Judaism, on the other hand, is much less direct. Chanukah is not perceived as the most important Jewish holiday. It does not celebrate any central Jewish religious principle but rather celebrates a historical event which has provident overtones. Certainly the menorah is a central part of the traditional celebration of the holiday, but the candelabrum itself does not readily focus attention on a religious doctrine in the manner of the cross (i.e., the salvation of mankind through the atonement and resurrection of Christ), nor does it visually portray a central tenent of religion as does a nativity scene (i.e., the divine and virgin birth of Christ in mortality).

Okrand, 207 Cal.App.3d at 579-580. *Cf. Hewitt,* 940 F.2d at 1568 (discussing *Okrand*).

[21] The *Okrand* court held that the

> display of the menorah at city hall may be distinguished from the lighted cross displayed in *Fox* by size and visibleness. The lighted cross in *Fox* was "visible for many miles in many directions, and can be and is viewed by persons driving the freeways who do not see it in the context of other Christmas decorations and who may not participate in such

the *Okrand* display included "comparable recognition of other religious symbols,"[22] *See Okrand*, 207 Cal.App.3d at 579. Fourth and finally, the *Okrand* menorah's "unique historical background . . . [rendered it] more a museum piece than a symbol of religious worship."[23] *See id.* at 580. On the basis of these four factors,

> [t]he *Okrand* court found the display did not exhibit a preference for one religion . . . [and t]herefore . . . concluded that the city's display of the unlit menorah was permissible under- . . . the California . . . Constitution[ ]. *Hewitt*, 940 F.2d at 1568.

Relying principally on the opinions in *Fox* and *Okrand*, the Ninth Circuit concluded in

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> celebrations at all . . . " [quoting *Fox*.] The Katowitz Menorah, on the other hand, stood unlit in a corner of the rotunda that was also occupied by a decorated Christmas tree.

Okrand, 207 Cal.App.3d at 579. *Cf. Hewitt*, 940 F.2d at 1568 (discussing *Okrand*).

[22] According to the Second District,

> there was no lack of "comparable recognition of other religious symbols." [citing *Fox*]. And, in our view, display of the menorah showed no more preference for Judaism than display of the Christmas tree showed for Christianity.

Okrand, 207 Cal.App.3d at 579. *Cf. Hewitt*, 940 F.2d at 1568 (discussing *Okrand*).

[23] "Finally," held the court in *Okrand*,

> the unlit Katowitz Menorah, with its unique historical background, was much more a museum piece than a symbol of religious worship.

Okrand, 207 Cal.App.3d at 580. *Cf. Hewitt*, 940 F.2d at 1568 (discussing *Okrand*).

Hewitt that the No Preference clause of the California Constitution flatly prohibits a governmental body from even appearing to prefer one religion over another or others. *See Hewitt*, 940 F.2d at 1567 ("not only may a governmental body not prefer one religion over another, it also may not *appear* to be acting preferentially"). *See also id.* at 1566-1567 (quoting *Sands v. Morongo Unified School Dist.*, 281 Cal. Rptr. 34 (Sup.Ct. 1991) (Kennard, J.) (plurality opinion) and citing *Okrand*).

Having so construed the No Preference Clause, the *Hewitt* court then addressed itself to the controversy before it, in which plaintiffs challenged whether San Bernardino County could constitutionally own and maintain a public park which contained religious statuary depicting New Testament scenes. The court ruled that "[b]ecause of their dominance of the landscape, the statutes are more symbols of worship than museum pieces." *Id.* at 1568. On this and other grounds,[24] the court held the County's ownership and maintenance of the park unconstitutional.

Distilling the opinions in *Hewitt*, *Okrand*, and *Fox* into a set of guiding principles, this

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[24] The court relied on two other grounds in arriving at its holding: First, the deed conveying the park to the County required that the statuary not be altered. Therefore, "[u]nlike a museum or a library which is free to add or subtract from its collection, the Antone Martin Memorial Park is a static collection of Christian symbols displayed and maintained by the government." *Hewitt*, 940 F.2d t [sic] 1568. Second, "[t]he allegedly great efforts taken by the County to ensure that a religious message was not perceived by the public [we]re unsuccessful." *Id.* at 1569.

court concludes that according to California law, a government body is conducting itself unconstitutionally whenever it so much as appears to be preferring one religion over another or others. *See Hewitt*, 940 F.2d at 1567; above p.16. Further, although no single circumstance may act as a litmus test for assessing the appearance of preference in a government display, nevertheless certain circumstances are highly probative. Among those circumstances are:

1. the religious significance of the item(s) challenged in the display;

2. The size and visibility of the display and of the item(s) in it;

3. Whether the display includes any comparably significant item(s) of other religions; and

4. The historical background of the item(s) included in the display.

Accordingly, the court must inquire into these, and other probative circumstances, in assessing whether the government conduct at issue in each of the present three cases unconstitutionally expresses a religious preference.

B. The Mt. Helix Cross

The Ninth Circuit's construction of the No Preference Clause subjects public entities to a demanding standard of constitutional compliance. So demanding is that standard that, even embracing the religiously neutral intentions

alleged by the County,[25] this court still is unable to hold other than that the County's conduct with respect to the Mt. Helix cross impermissibly violates the California Constitution.

1. The Okrand factors

Inquiring into the four distinguishing factors discussed by the *Okrand* court and subsequently focused upon by the Ninth Circuit in *Hewitt*, *see* above pages 14-16, 17 and *Hewitt*, 940 F.2d at 1568, the court notes that not one of these factors is satisfied by the conduct challenged in the present case.

a. Religious significance of the Latin cross

Beginning with the first of the four *Okrand* factors, the court finds that the Latin cross is a powerful religious symbol. It is true, as evidenced by the varying sentiments of the plaintiffs in the instant three actions, that different individuals may identify with the Latin cross in different ways and in differing degrees. That the Latin cross is the

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[25] The presence of a secular purpose clearly would be probative in an inquiry under the United States Constitution because a secular purpose satisfies in part the federal constitutional standard regulating governments' religious involvement. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Further, the presence of such a purpose would be probative in an inquiry conducted pursuant to the California Constitution's Establishment Clause. Under California's No Preference Clause, however, the presence of a secular purpose is irrelevant. *See Hewitt*, 940 F.2d 1569 ("the no preference clause is not satisfied by a secular purpose").

principal symbol, and a universally recognized symbol, of Christianity, however, is beyond dispute. For regardless of how one may choose to characterize the Latin cross, the fact remains that

> [t]he cross is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.

Okrand, 207 Cal.App.3d at 579-580.[26]

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[26] *See West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 632 (1943) ("the church speaks through the cross"); *Harris*, slip op. at 4 ("[t]here . . . can be no doubt that a Latin cross is the principal and unmistakable symbol of Christianity as practiced in this country today"); *St. Charles*, 794 F.2d at 271 (Latin cross "is, indeed, the principal symbol of Christianity as practiced in this country today"); *Rabun*, 698 F.2d at 1103 ("Latin cross is a universally recognized symbol of Christianity"); Mendelson v. City of St. Cloud, 719 F.Supp. 1065, 1069 (M.D. Fla. 1989) ("[t]he Latin cross is unmistakably a universal symbol of Christianity"); *Hewitt v. Joyner*, 705 F.Supp. 1443, 1449 (C.D. Cal. 1989) (Latin cross "epitomize[s] Christian faith . . . is the pre-eminent symbol of many Christian religions and clearly represents the key Christian concept of the Crucifixion and Resurrection of Christ"), *rev'd* 940 F.2d 1561 (9th Cir. 1991); *Jewish War Veterans v. United States*, 695 F.Supp. 3, 13 (D. Col. 1988) ("the Latin cross . . . is a readily identifiable symbol of Christianity"); *Libin v. Town of Greenwich*, 625 F.Supp. 393, 399 (D. Conn. 1985) ("the cross is primarily a religious symbol . . . [and a]ny secondary meaning as a symbol of peace appears to be derived from the teachings of Christ as set forth in the tenets of the Christian religions to which the cross is sacred"); *Greater Houston Chapter of the American Civil Liberties Union v. Eckels*, 589 F.Supp. 222, 234 (S.C. Tex. 1984) ("[t]hat the cross . . . [is] the primary symbol[ ] for Christianity . . . is beyond question"), *appeal dismissed*, 755 F.2d 426 (5th Cir. 1985), *reh'g denied en banc*, 763 F.2d 180 (5th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985).

Not only is the cross a profoundly religious symbol; it also is an exceedingly powerful symbol. As the United States Supreme Court once observed,

> [s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem . . . to symbolize some system, idea, [or] institution . . . is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to [symbols] . . . [T]he church speaks through the Cross, the Crucifix, the altar and shrine . . . Symbols of State often convey political ideas just as religious symbols come to convey theological ones.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 632 (1943) (striking down compulsory participation of public school students in flag salutes) (quoted in *Greater Houston Chapter of the American Civil Liberties Union v. Eckels* (*Eckels*), 589 F.Supp. 222, 235 (S.D. Tex. 1984), *appeal dismissed*, 755 F.2d 426 (5th Cir. 1985), *reh'g denied en banc*, 763 F.2d 180 (5th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985)).

So powerful is the image of the cross on Mt. Helix, for example, that *amicus curiae*, who resides with his wife in a home with a view of the cross, declares:

> The memorial cross on top of Mt. Helix has been a source of inspiration and comfort to us both in times of adversity, and has played, and continues to play, a personal and instrumental part in the daily practice of our faith.
>
> [W]ere the cross removed [our residence] would have a diminished appeal to other members of

> the Christian faith who would be potential purchasers.

Declaration of Arlington Ray Robbins in Support of Motion to Intervene, at pp. 3-4.

Further evidence of the Mt. Helix Latin cross' powerful religious symbolism may be gleaned from a catalogue of "what the site has been used for since the [cross was] constructed . . . Easter sunrise services and . . . wedding[s]." *Eckels*, 598 F.Supp. at 235.[27] *See* above note 11. Activities such as these not only reflect, but also augment, the religious significance of the cross on Mt. Helix. *Cf. County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter* (*Allegheny*), 492 U.S. 573, 599 (1989).[28]

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[27] The situation before this court is not unlike that presented in *Eckels*, where three Latin crosses and a Star of David erected in a public park were similarly used for religious purposes. The court in *Eckels* held that

> [t]he symbols have had the effect of converting this site into an open air church on those occasions. There is nothing remotely secular about church worship, and the religious overtones of most weddings are undeniable.

Eckels, 598 F.Supp. at 235. As plaintiff's counsel in the present case rather pointedly observes, "[t]he people who go to Mt. Helix for annual Easter services are there to commemorate Jesus Christ, not Mary Yawkey." Plaintiff's Opposition at 6.

[28] The United States Supreme Court held in *Allegheny* that "because some . . . carols performed at the site of [a] creche [display] were religious in nature, those carols were more likely to augment the religious quality of the scene than the secularize it." *Allegheny*, 492 U.S. at 599.

b. Size and visibility of the display

The powerful religious symbolism of the Mt. Helix Latin cross is further amplified by its sheer size and visibility. Standing alone at the very summit of Mt. Helix, illuminated every evening, and discernible from a considerable distance, Mt. Helix's Latin cross is *the* focal point of the public park in which it is located.[29] Further, the cross' commanding skyline presence effectively precludes the County from being able to successfully dissociate itself from the cross' symbolism. After all, the cross is so prominent that even were the County to install a plaque or sign expressing a message of non-preference, still the vast majority of people who see the cross – those who view it from afar – would not receive the benefit of knowing what the plaque said.[30]

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[29] It is true that the religious significance of the deed's requiring the cross to be illuminated on certain Christian holidays, *see* above n.10, is diminished by the cross' being illuminated every evening of the year. This creative resolution of one infirmity, however, merely amplifies another. For in permitting the cross to be rendered visible day *and* night the year around, the County is doubling the amount of time that its residents and visitors are exposed to the cross' powerful religious symbolism. *Cf. Allegheny*, 492 U.S. at 599; above n.28.

[30] *Cf. Allegheny*, 492 U.S. at 599 ("The effect of the creche on those who viewed it when the choirs were not singing – the vast majority of the time – cannot be negated by the presence of the choir program.").

c. Comparable symbols of other religions

Were the Nature Theatre to include symbols of other religions, comparable in significance to the Latin cross and similar in stature to its embodiment atop Mt. Helix, then any impermissible appearance of religious preference would be diminished, if not eliminated. By way of example, the City of Los Angeles successfully neutralized the potential appearance of preference in its display of the Katowitz menorah by recognizing along with the menorah a Christmas tree together with other non-Jewish religious and secular symbols. Viewed in light of the No Preference Clause line of opinions which precede this case, however, the government conduct presently at issue appears to be considerably more akin to the government conduct struck down in *Fox* and *Hewitt* than to that upheld in *Okrand*. Both *Fox* and *Hewitt* implicated displays of a symbol or symbols associated with only one religion. Similarly, San Diego's present conduct in displaying the cross atop Mt. Helix is not neutralized by recognition of the symbols or rituals of other religions.[31]

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[31] Of greater constitutional concern than the County's acquiescence in the presence of the Latin cross on Mt. Helix would be its acquiescence in the covenants requiring that the cross remain lit on certain religiously significant days of the year and, even more troublingly, that the park's use be restricted to a particular sectarian activity – the Easter sunrise service – every year at a certain time. With respect to the second covenant in particular, if the government's implicit guarantee that it would subordinate the rights of some individuals to those of other individuals based solely on those individuals' religious convictions would not generate the appearance of religious preference, then this court is at a loss to identify what could. Nevertheless, in the absence of any evidence that the County has ever enforced the Easter service covenant against an

d. Historical background

As for the fourth and final factor identified in *Okrand* – the historical background of the item(s) included in the display – the court notes that dating as far back as it does and recognized as widely as it is, the cross atop Mt. Helix no doubt has acquired local historic significance. The historic significance of the cross on Mt. Helix is of a different quality, however, than that of displays such as the menorah salvaged from the Holocaust and upheld in *Okrand*. The *Okrand* display's significance lay in the unique set of global historical circumstances – world war, totalitarianism and genocide – from which the Katowitz menorah emerged. By contrast, the Mt. Helix cross' significance lies primarily in its prominence, its longevity and its association with the annual Easter sunrise service. Whereas in *Okrand* the item displayed sprang from the historical circumstances which rendered it significant, in the present situation it is the historical circumstances which spring from the item displayed. The historical significance of the cross on Mt. Helix, in other words, derives primarily from long use. As the Supreme Court has made emphatically clear, however, "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 792 (1973) (quoting and distinguishing *Walz*).[32]

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applicant desiring to use the park for an alternative purpose on Easter morning, that covenant is not ripe for review.

[32] *See also Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees"); *Allegheny*, 492 U.S. at 603 ("history

e. Location

In addition to the four factors identified as probative in the *Okrand* opinion, the court identifies a fifth: location. Insofar as its location, the Mt. Helix cross is less susceptible to the danger of exhibiting preference than were the *Fox* cross and the *Okrand* menorah. The cross in *Fox* was emblazoned across the face of as explicit a symbol of public life and governance as Los Angeles City Hall. The menorah in *Okrand*, though less conspicuous, also was located at City Hall. The public property with which the Mt. Helix cross is associated – a park, by contrast – does not symbolize government authority. Accordingly insofar as its location, the Mt. Helix cross compares favorably to the symbols considered in *Fox* and *Okrand*.

Still, however, the court notes that the public environment in which the Mt. Helix cross is displayed is not dissimilar to that in which the statuary struck down in *Hewitt* also were displayed. True, the presence of a church beside the park in *Hewitt* rendered the statuary display more preferential in appearance than has the Nature Theatre rendered the cross on Mt. Helix. Nevertheless, it is noteworthy that a display need not be as conspicuously associated with the government as were the displays in *Fox* and *Okrand* in order to run afoul of California's No Preference Clause.[33]

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cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed"); *Rabun*, 698 F.2d at 1111; *Harris*, 927 F.2d at 1414-1415.

[33] *Amicus curiae* argues that an individual observing religiously symbolic grave markers in a public cemetery could not reasonably attribute to the government the expressions of religious faith implicit in those markers. The court agrees;

Considered together, the five circumstances discussed above characterize the prominent government display of a solitary symbol laden with religious meaning, the sectarian significance of which is moderated neither by the display's history nor by its remoteness from symbols of governance.

2. Non-factors

In addition to the five circumstances discussed above, the court notes that additional qualities characterize the cross on Mt. Helix and the County's conduct with respect to it. Among these are (a) the nature and extent of public expressions both in support of and in opposition to the cross, (b) the economics of requiring that the County remove the cross or divest itself of the property on which the cross now stands, and (c) the reversionary consequences for Mt. Helix Nature Theatre should the County in fact be required to part company with the cross.

Notwithstanding the relevance of these matters to the history and future disposition of the Mt. Helix cross, however, the court may not consider them in ruling on

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however, the same individual observing a 36 foot tall, religiously symbolic, permanent monument centrally placed and illuminated in a public park commanding a view of the locale could reasonably draw the opposite conclusion. So, too, could the thousands of additional reasonable observers who daily pass within view of such an edifice. For this reason, the public cemetery is distinguishable from the situation presently before the court.

the constitutionality of the County's relationship with the cross.

a. Silence of religious minorities

First, the court notes that the cross stood, unchallenged, on public property for a period of sixty-one years before this lawsuit was filed and, moreover, that the record in this case reveals few public expressions of opposition to the cross' presence. Ironically, the individual challenging the presence and disposition of the cross identifies himself as a Catholic and, therefore, as someone for whom the cross presumably is a symbol of reverence. In contrast to plaintiff's expression of concern at the public presence and disposition of the symbol of his faith are the expressions of concern which individuals of other faiths have voiced at the prospect of that symbol's *removal*. Says Rabbi Michael P. Sternfield: "I do not know of anyone in the organized Jewish community who wants to make an issue of these crosses." *See* Letter to the Editor written by Rabbi Michael P. Sternfield and published in *The San Diego Union*.[34]

His letter notwithstanding, however, Rabbi Sternfield cannot be said to speak for the entire community of non-adherents to Christianity. The record reveals the existence

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[34] The court takes judicial notice of Rabbi Sternfield's letter. *See* Post-Hearing Request for Judicial Notice filed in No. 90-0134 by Amcius Curiae on December 11, 1991. Further, the court also takes judicial notice of Rabbi Sternfield's September 18, 1991 unpublished Yom Kippur address, in which Rabbi Sternfield expressed his opposition to the challenges presently before the court.

of other individuals – adherents and non-adherents: Catholics, Jews, Atheists and others – who feel injured by the presence of one or more of the Latin crosses involved in this, and its companion, cases.[35] That neither these individuals nor others expressed concern before now cannot be interpreted as an indication that the County's conduct with respect to the cross does not exhibit preference. In *Fox*, which presented a situation not dissimilar in this regard to the situation presently before the court,

> the City of Los Angeles contended that because the cross-lighting had occurred for 30 years without citizen complaint, obviously the public did not perceive any preference on the part of the city. The court rejected this argument, [however,] acknowledging that the silence of religious minorities may signal something quite different from disinterest.

Hewitt, 940 F.2d at 1567 (citations omitted) (citing *Fox*, 22 Cal.3d at 797).

b. Cost

A second circumstance, with respect to which the court is aware, but which the court must not consider in ruling on the constitutionality of the County's acquiescence in the presence of the cross, is the matter of thrift.

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[35] By way of example, the court notes plaintiffs in these actions, representatives of the Anti-Defamation League and other private citizens. *See, e.g.*, Plaintiffs' Exhibits F and G in No. 90-0135, documents which are matters of public record and of which the court takes judicial notice with respect to each of the three cases presently before it.

The court acknowledges that, quite apart from whatever range of personal and religious meanings have been ascribed to the Mt. Helix Latin cross over time, the cross also has evolved a separate, secular importance, for example, as a navigational aid for pilots. Therefore, it is not implausible that the assistance which the cross provides to pilots and navigators is one reason why the County permits the cross to stand. Had the Latin cross not already been present when the County acquired Mt. Helix, then perhaps the County would have chosen to erect a different edifice in order to assist pilots.

The cross' having already been built, however, it may be argued that the County should not have to incur the superfluous expense and inconvenience of razing the cross and replacing it with a secular edifice dedicated to the very same end. Moreover, it could be argued to be a violation of the public trust were the County, as beneficiary of Cyrus Yawkey's largesse, to destroy, let deteriorate or otherwise squander a useful asset, such as the Latin cross, then present on the deeded land.

The argument is cogent; however, it can be no more persuasive in this and the accompanying two cases than have been similar such convenience-, efficiency- and expense-oriented arguments which the Supreme Court traditionally has rejected in vindication of constitutional rights. *See, e.g., Frontiero v. Richardson,* 411 U.S. 677, 690 (1973) (due process); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972) (same); *Reed v. Reed,* 404 U.S. 71, 76 (1971) (equal protection); *Carrington v. Rash,* 380 U.S. 89, 96 (1965) (equal protection, right to vote). Quite simply, mere inconvenience cannot be permitted to trump constitutional strictures such as those regulating the relationship

between religion and the state. The court, therefore, holds that the economic expense of removing the cross, of rendering non-public the property on which the cross stands or of otherwise attempting to cure the present infirmity may not bear on the constitutional challenge presently before the court.

c. Reversionary consequences

Finally, the reversionary consequences of the cross' removal also may not inform the court's decision.

The court entertains no doubt that the County's conduct in permitting the cross to stand atop Mt. Helix is motivated considerably, if not principally, by the desire to preserve Mt. Helix Nature Theatre as a public park. After all, the reversionary clause in the deed conveying Mt. Helix Nature Theatre appears to suggest that preservation of the cross atop Mt. Helix is necessary in order to preserve the Nature Theatre as a public park.[36] Moreover, equally necessary (according to the terms of the deed) in order for the park to remain in the public domain is adherence to the covenants requiring that an Easter service occur annually at the Theatre and that the cross be

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[36] The reversionary consequences of the deed conveying Mt. Helix Nature Theatre to San Diego County are not properly before the court. The present lawsuit poses constitutional issues only. It does not provide a sufficient legal or evidentiary basis from which to rule on the sufficiency and application of the deed's reversionary clause.

illuminated during specified Christian holidays.[37] If the County fails to perform a single one of these covenants, then it risks the park property's reversion to the heirs of Cyrus Yawkey. Thus it is fair to infer that the preservation of a public park is a principal factor motivating the County to permit the cross to stand, to restrict the Theatre's use annually on Easter Sunday and to permit the cross to be illuminated on certain nights of the year.

Whatever the reason may be for San Diego County's compliance with the restrictive covenants, however, it is axiomatic that restrictive covenants and potential possibilities of reverter may not compromise guarantees so fundamental as to be reposed in the Constitution either of the United States or of any constituent state. By way of example, if the Yawkey deed included a covenant requiring that the Mt. Helix Nature Theatre revert to a private interest if a white person used the property, then the County's conduct in excluding whites from the park would satisfy its contractual covenant yet violate the guarantees of equal protection found in both the California and United States constitutions. *See* Cal. Const. art. I, § 7 (equal protection); U.S. Const. amend. XIV, § 1 (same). Accordingly, the County's conduct would be unconstitutional as a matter of law, and the County would be required to stop excluding whites, regardless of the attendant reversionary consequences. In that case, as in this, to

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[37] Among the evenings of the year on which the deed expressly requires that the cross on Mt. Helix be lit are Christmas Eve and the night before Easter. *See* above n.10.

permit the reversionary consequences of covenant non-compliance to influence the court's ruling on a constitutional issue would be to render subordinate to private contract to fundamental, *constitutional* directives which this court is sworn to uphold.

Just as the court may not suspend the directives of the Equal Protection Clause in vindication of public space, so may it not suspend the directives of the No Preference Clause in pursuit of the same end. Before the court is a constitutional challenge, not an action for declaratory judgment or contractual breach. Accordingly, only the constitutional issue is ripe for adjudication, and the reversionary consequences of today's decision must be left to be adjudicated another day. *See Evans v. Newton*, 382 U.S. 296 (1966) (whether designating public park for exclusive use by white people satisfies the Fourteenth Amendment is an issue to be considered separately from the reversionary consequences of extending park use to non-whites).

The court now turns to Civ. No. 89-0820 GT, challenging the inclusion of a Latin cross on the insignia of the City of La Mesa.

C. The La Mesa Insignia

The City of La Mesa contends that including Latin cross on its official insignia is intended to help the public identify the insignia's bearers with the city of La Mesa, and the Latin cross atop Mt. Helix is its unique distinguishing feature. As the city's counsel stated in oral argument,

> The logo clearly depicts Mount Helix, and I think that depiction is certainly logical. The city of La Mesa has been known for many, many years as "the Jewel of the Hills." Well, the Hill is Mount Helix. There is a high school named for Mt. Helix; La Mesa residents get their water from the Helix Water District; there are a wide variety of establishments in the city of La Mesa that bear the name Mount Helix and Helix . . . So there is a very firm, long standing tie between the city of La Mesa and Mount Helix.

Given the geographic and historic nexus between Mt. Helix, the Latin cross atop it and the city of La Mesa, it is clear that the cross' inclusion on the city's official insignia would help a knowledgeable public to quickly, easily and correctly identify local police officers, squad cars, fire fighters, animal control officers and other city employees and vehicles. Accordingly, the court accepts as reasonable counsel's representation that inclusion of the cross on the city's insignia is intended to represent a well-known local feature identifiable with La Mesa and, in so doing, to render the City's property and personnel more readily identifiable.

Were this particular feature not so closely and universally identifiable with a particular religion, then its presence on a government insignia might not disturb the No Preference Clause. Here, however, the feature depicted on what La Mesa has chosen as the symbol of its very authority to govern is the profoundly religiously symbolic Latin cross. Moreover, it is the Mt. Helix Latin cross, which this court already has found contributes to an appearance of government religious preference sufficient to render unconstitutional its presence in a public

park. *See* above pp. 18-31. Under such circumstances, the court cannot find other than that La Mesa's incorporation of the Mt. Helix Latin cross in its official insignia communicates a message of government preference for religion in general, and for certain sects in particular, thereby violating California's proscription against the appearance of preference.

The danger implicit in permitting the incorporation of a religious symbol within a symbol of the authority to govern has been noted by the Tenth Circuit in *Friedman v. Board of County Commissioners of Bernalillo*, a case involving the incorporation of the Latin cross on a city seal. In *Friedman*, the court expressed concern lest

> [a] person approached by officers leaving a patrol care emblazoned with this seal could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian.

Friedman, 781 F.2d 782 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986) (holding district court's order upholding county seal "clearly erroneous").[38] As the

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[38] *See also Harris*, 927 F.2d at 1412. *Harris* involved a challenge to a seal within which the Latin cross was no more prominent than several secular images. The court in *Harris* held that

> [l]ike the seat of county government in . . . *Allegheny* . . . the corporate seal of a municipality is

Friedman court further concluded, the government's inclusion of a Latin cross in its imprimatur would have "threatening connotation" for, among others, Lebanese Moslems, Northern Irish Protestants, Native Americans and Jews. 781 F.2d at 781-82.[39] *Cf. Mendelson v. City of St.*

> plainly under government control and is a clear symbol of government power. In fact the Rolling Meadows seal presents a more compelling case for finding the challenged display unconstitutional. The City's seal is a permanent statement that is viewed year-round, while the creche is displayed only seasonally amidst the secular celebration of Christmas. The Latin cross on the seal, then, brings together church and state in a manner that suggests their alliance perhaps even more ardently than the unconstitutional creche display[ ] in . . . *Allegheny* . . . The seal of Rolling Meadows acts as the City's imprimatur for official correspondence, property and business. The conspicuous depiction of the pre-eminent symbol of a particular faith on that seal conveys a message of approval that is simply inconsistent with the first amendment.

Id. (citation omitted) (holding that inclusion of cross on government seal violated federal Establishment Clause).

[39] The cross incorporated in the seal before the *Friedman* court presented an appearance of preference more egregious than that presented by the cross incorporated in La Mesa's insignia: The *Friedman* cross was more conspicuous and was accompanied by the Latin phrase, "Con Esta Vencemos" ("With This We Conquer"). *See Friedman*, 781 F.2d 782. The egregiousness of one incursion on the Constitution, however, cannot excuse the smaller magnitude of a second, even inadvertent incursion. *Compare Friedman and Harris*, 927 F.2d at 1415 (reversing lower court's finding that inclusion of non-religious symbols in city seal sufficiently neutralized any religious message that could be conveyed by inclusion of cross).

Cloud, 719 F.Supp. 1065 (M.D. Fla. 1989).[40]

Clearly, the Latin cross is not a benign symbol, and the perception that it is favored could well deter non-adherents from living in, visiting, or serving as employees of the City of La Mesa. The court, therefore, holds that La Mesa's inclusion of the Latin cross on its insignia is susceptible of the appearance of government preference and, therefore, is in violation of the No Preference Clause.

The court now turns its attention to Civ. No. 90-0135 GT and the cross atop Mt. Soledad.

D. The Mt. Soledad Cross

The Latin cross displayed atop Mt. Soledad is subject to the same constitutional infirmities to which the Latin cross displayed atop Mt. Helix is subject. Like its Mt. Helix counterpart, the Mt. Soledad cross is a powerful sectarian symbol, the religious effect of which is evidenced by the uses to which it has been put as the backdrop for Christian sectarian events, such as weddings, baptisms and Easter sunrise services. Its commanding presence and nightly illumination at the very

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[40] *Mendelson* involved an illuminated Latin cross erected atop a water tower in the city of St. Cloud. Emblazoned across the middle of the tower was the slogan "Welcome to St. Cloud" and a replica of the city seal. The court concluded from this display that "[t]hose who observe the cross atop the water tower can only presume that the City of St. Cloud has abandoned any pretense of religious neutrality and has wholeheartedly endorsed the Christian religion." *Id.* at 1071 (citing cases).

summit of Mt. Soledad render it the focal point of the public park in which it stands – so much so that it may be said, as between the Latin cross and the park, is not clear which is meant to adorn which. No comparable symbols of other religions are present to moderate the cross' sectarian message. Nor is the cross' sectarian significance mitigated by its history. In fact, to the contrary, history belies and reinforces and sectarian significance of the Latin cross displayed atop Mt. Soledad.

The City contends that it permits the cross to stand in order to commemorate the lives and sacrifices of fallen soldiers. "It is obvious," asserts counsel for the City, "that a cross used as a war memorial has lost its religious symbolization and has become resymbolized to take on a new commemorative secular meaning." Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, November 13, 1990, at 11. Obvious though this may seem to counsel for the City, however, it is equally obvious to this court that "even if one strains to view the [cross] in the context of a war memorial, [its] primary effect is to give the impression that only Christians . . . are being honored." *Eckels*, 589 F.Supp. at 235. *See also* Declaration of Rabbi Michael Sternfield;[41] *Libin*, above n.26.

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[41] Rabbi Sternfield declares:

> The religiosity of the cross is, if anything, heightened when it is used in connection with memorializing the dead, because of the close connection between our thoughts of death and our religious beliefs. A war memorial intended to honor all veterans, or all war dead, would send a message of exclusion of Jews if it were in the shape of a cross. While this might not be

More troubling than the City's characterization of the Mt. Soledad cross as a *secular* memorial, however, is its characterization of the Mt. Soledad cross as a memorial at all. Whereas Cyrus Yawkey's deed corroborates the genuineness of the commemorative objective attending the cross on Mt. Helix, no corresponding evidence corroborates the genuineness of the alleged commemorative objective which the City advances in support of the cross on Mt. Soledad. In fact to the contrary, the evidence indicates that the city's purported commemorative objective is a pretext.

The numerous declarations, news articles, book excerpts and other exhibits submitted by the parties reveal only one occasion between the erection of the cross on Mt. Soledad and the filing of this lawsuit on which the cross site has ever been recognized as a war memorial.[42] That occasion was the cross' dedication on April 17, 1954, when the *San Diego Union* reported that the cross "is meant to be a lasting memorial to the dead of the two

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> the intended message, the use of a cross. While this might not be the intended message, the use of a cross for this purpose would nonetheless convey this message from the perspective of most Jews . . . The cross has not become a secular symbol, from the perspective of Jews, for any purpose, and because of the heightened religiosity of symbols when used in the context of death, it would not be reasonable to conclude that persons of non-Christian faiths would perceive this use of the cross as secular.

Declaration of Rabbi Michael Sternfield, October 26, 1990, at 1 (Plaintiffs' Exhibit J).

[42] *Since* this lawsuit was filed, several veterans ceremonies have been held atop Mt. Soledad. *See* above note 13.

world wars and the Korean fighting." With the exception of this single newspaper report, there is no evidence that prior to this lawsuit the City intended the cross to serve as a memorial.

Correspondence between the City and Mt. Soledad Memorial Association, which the city authorized to build and maintain the cross, together with newspaper accounts from 1954 indicate that the cross was intended to replace predecessor crosses which had once been the scene of Easter sunrise services but had since been vandalized or fallen into disrepair. Clearly these predecessor crosses, which date as far back as 1913, could not have been erected as memorials to the dead of the two world wars and the Korean fighting, all of which occurred after 1913. Nevertheless, the fact that non-commemorative crosses once stood on a site where citizens subsequently chose to erect a new cross should not by itself defeat the genuineness of the new cross' purported commemorative purpose.

News accounts reveal further indications of a religious purpose. Several such accounts indicate, for example, that a ceremony dedicating the cross occurred, as planned, on Easter Sunday 1954. Although Memorial Day occurs just 6 weeks after Easter, the Memorial Association evidently preferred to schedule the cross' completion and dedication for the day of the Resurrection. Although it could have selected any of innumerable different symbols, including many different types of crosses, in order to commemorate fallen soldiers of all faiths, the Memorial Association selected the configuration of the *Latin* cross, the type of cross on which biblical and historical accounts

indicate that Jesus Christ, on the morning marked by Easter, was crucified.

City records, correspondence and news articles indicate, moreover, that every Easter without fail since 1954, the Mt. Soledad Memorial Association has sponsored an Easter sunrise service at the site of the cross. There is no record of the Association, the City or any other organization having sponsored a memorial service or ceremony at the site of the cross on Memorial Day, Veterans Day or any other day between Easter Sunday 1954 and the day of which this suit was filed. Also during the period between Easter Sunday 1954 and the day on which this suit was filed, no plaque or sign existed to indicate to visitors that the cross was intended to commemorate our country's war dead. As plaintiffs observe, there was "no way for a visitor to know that on April 18, 1954, someone stood beside the Cross and described it as a veterans memorial."

In light of this evidence, it is not surprising that numerous travel guides, road maps, the Yellow Pages telephone directory and even federal government publications refer to the structure atop Mt. Soledad as the "Soledad Easter Cross." Even the Mt. Soledad Memorial Association itself appears to have lost sight of the purported purpose for which it erected the cross. Its own bylaws describe its purpose as the promotion of "community interest in the development of the public facilities of the Mt. Soledad Park area." The bylaws make no reference to the commemoration of war dead.

Faced with this battery of evidence, it is difficult to conclude that the commemorative objective advanced by

the City is anything other than pretext. The court, therefore, finds that insofar as the disposition of the Mt. Soledad Latin cross, the City has impermissibly exhibited (if no exercised) preference. The City's conduct, consequently, is unconstitutional, and the City is directed that, if it truly wishes to honor the war dead, then it should do so other than with the Latin cross which it has permitted to stand atop Mt. Soledad. *Cf. Eckels*, 589 F.Supp. at 234 ("because the county can effectively recognize its war dead without resort to the use of these religious symbols, it must do so").

IV. CONCLUSION

The No Preference Clause, which California courts and the Ninth Circuit have interpreted as censuring so much as even the appearance of religious partiality, is a sweeping constitutional edict. Insofar as the No Preference Clause is also the supreme law of California, binding constitutional precedent compels this court to hold that the permanent presence and disposition of the Latin crosses atop Mt. Helix, atop Mt. Soledad and on the La Mesa insignia are unconstitutional.

Were the parcels of land atop which the Mt. Helix and Mt. Soledad crosses presently stand privately rather than publicly owned, then these cases would be entirely different. Likewise were the crosses raised only periodically in order to accommodate individuals who from time to time wish to incorporate these public spaces in their religious observance, then again the court would be dealing with an entirely different situation. Where as here, however, the Latin cross appears as a permanent,

salient symbol on public property and on a public imprimatur, California's Constitution will not permit it to continue to stand.

As to each of these three cases, the court enters summary judgment for plaintiffs and issues a permanent injunction forbidding the permanent presence of each cross on the public property or imprimatur where it currently appears. The court grants defendants three months within which to comply with its order and further directs that any stay of the order should be sought from the Court of Appeals.

IT IS SO ORDERED.

December 3, 1991
date

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District
Judge

cc: All counsel

APPENDIX

Supreme Court, U.S.
FILED
MAY 26 1994
OFFICE OF THE CLERK

No. 93-1692

In The

Supreme Court of the United States

October Term, 1993

COUNTY OF SAN DIEGO AND THE BOARD OF SUPERVISORS FOR THE COUNTY OF SAN DIEGO,

Petitioners,

v.

JOHN MURPHY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JORDAN C. BUDD
Counsel of Record
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
1202 Kettner Blvd., Suite 6200
San Diego, CA 92101
(619) 232-2121

LEONARD B. SIMON
RANDI D. WEINBERGER
MILBERG, WEISS, BERSHAD, HYNES & LERACH
600 W. Broadway, Suite 1800
San Diego, CA 92101
(619) 231-1058

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether *Pullman* abstention is required when a federal court considers a claim arising under a state constitutional provision that has been interpreted by state courts in analogous, but not identical, factual contexts.

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Cal. Const., art. I, § 4 ..... *passim*

No. 93-1692

In The

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COUNTY OF SAN DIEGO AND THE BOARD OF SUPERVISORS FOR THE COUNTY OF SAN DIEGO,

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v.

JOHN MURPHY,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent John Murphy submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Defendants/petitioners, the County of San Diego and the members of its Board of Supervisors, seek a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit affirming the district

court's grant of summary judgment to plaintiff/respondent. Respondent's suit challenges, as a violation of the constitutions of the State of California and the United States, petitioners' use of public park land and funds to display a large Latin cross at the summit of Mount Helix, a prominent County landmark. The decision below rests exclusively on state constitutional grounds.

I. Factual Background

Since 1929, the County of San Diego has owned and maintained a public park located atop Mount Helix, with a thirty-six foot Latin cross standing at the summit. Mount Helix is "[o]ne of the highest hills in San Diego," and the cross at the top "is visible from a substantial distance." Appendix to Petition for Writ of Certiorari (hereafter "App."), at 10. The County acquired the park by a deed that requires the County to maintain the cross, allows no other monuments in the park, and requires that "annually, on each and every Easter Sunday forever, religious services of a strictly non-sectarian character and appropriately suitable for commemorating the resurrection of the Lord Jesus Christ, as taught by the Christian churches of the world, shall be held at Sunrise" on park grounds. App. 10.

The deed also establishes a trust fund designating the County of San Diego as trustee and requiring that a contribution be made annually from the fund for the expenses of the Easter services. App. 11. The trust fund is administered by County employees, but no reimbursement is made from the trust fund for the portion of their salaries representing work on its behalf. App. 51 n.9.

The deed also manifests the deeply sectarian purposes of the grantor. In addition to the provision requiring annual Easter sunrise services "as taught by the Christian churches of the world," the deed recites that the grantor preserved the property to render it suitable for religious purposes, and requires that "[t]he Cross- . . . shall be lighted" during certain periods, including Christmas evening and all night before Easter sunrise. App. 52 n.10.

After respondent filed suit, the County of San Diego designated a portion of the Mount Helix park, including the cross, as an historical monument. As the Court of Appeals noted, however, "the County provides no historically significant facts independent of the cross' inherently religious nature. Indeed, it appears the most historically significant aspect of the cross is its longstanding use as the site of annual Easter services." App. 24.

II. Proceedings Below

The district court granted respondent's motion for summary judgment based on its determination that the Mount Helix cross violated the No Preference Clause of the California Constitution, which guarantees the "free exercise and enjoyment of religion without discrimination or preference. . . . " Cal. Const., art. I, § 4; App. 90. In view of that ruling, the court declined to reach respondent's remaining federal constitutional claim, or claims based on other provisions of the California Constitution. App. 60-61.

The Court of Appeals for the Ninth Circuit affirmed on state constitutional grounds alone. App. 25, 31. The court carefully considered and rejected petitioners' contention, based on the doctrine set forth in *Texas Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), that adjudication of respondent's claim under the No Preference Clause was an abuse of discretion. App. 14-15.

SUMMARY OF ARGUMENT

As the sole ground for issuance of a writ, petitioners assert that the Court of Appeals erred in permitting the district court to decide respondent's state constitutional claim. This asserted basis for review fails to satisfy the standards for exercise of the Court's discretionary jurisdiction, and is premised on an untenable construction of the *Pullman* abstention doctrine.

1. In affirming the district court's decision to adjudicate respondent's claim, the Court of Appeals applied the settled rule that federal courts need not abstain under *Pullman* if they can predict with any confidence how a state court would resolve the matter. In view of the extensive body of California case law construing the No Preference Clause (including a previous challenge to a Latin cross on public property), the Court of Appeals appropriately determined that abstention was not required. The court's reasoning is consistent with the uniform body of case authority interpreting the *Pullman* doctrine, and thus presents no conflict with other circuits that might justify this Court's review.

2. The Court of Appeals correctly distinguished the ruling in *Reetz v. Bozanich*, 397 U.S. 82 (1970), which petitioners claim is in conflict with the holding below. Abstention was appropriate in *Reetz* because the relevant provision had never been interpreted by a state court, and addressed a unique subject with which the federal courts had no experience – fishing rights under the Alaska Constitution. Conversely, the No Preference Clause has been interpreted repeatedly, on analogous facts, and is closely related to the federal Establishment Clause, with which the federal courts have considerable experience. Accordingly, no conflict exists between the decision of the Court of Appeals and any decision of this Court.

REASONS FOR DENYING THE PETITION

I. California Case Law Provides An Ample Basis For Adjudicating Respondent's State Constitutional Claim

The *Pullman* doctrine counsels federal courts to abstain from deciding unclear questions of state law if an alternative construction will render unnecessary, or substantially affect, the ultimate resolution of a federal constitutional question. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). The doctrine has no relevance here, where the district court applied settled case authority.

A. Principles Of *Pullman* Abstention

"The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959). "When such exceptional circumstances are not present, denial of [jurisdiction] . . . by the federal courts *merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state*, would thwart the purpose of the jurisdictional act." *Meredith v. City of Winter Haven*, 320 U.S. 228, 234-35 (1943) (emphasis added); *Lehman Brothers v. Schein*, 416 U.S. 386, 390 (1974) ("the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit").

Specifically, a question of state law "is not 'doubtful' or 'uncertain' just because it turns on the facts of the particular case. Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with *any* confidence how the state's highest court would decide" an issue. *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460, 1463-65 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (emphasis added).

B. The Decision In *Fox v. City Of Los Angeles* Is Squarely On Point And Precludes Abstention

In *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663 (Cal. 1978), the California Supreme Court considered a challenge under California's No Preference Clause to the City of Los Angeles' practice of "illuminating on the city hall . . . a huge cross – at first to honor the Christmas holidays and then also . . . to honor Easter Sundays, both Latin and Eastern Orthodox." *Id.* at 794. The court observed that the case was "marked by the location, size, and visibility of the Los Angeles cross," as well as the fact that no other religious symbol had ever been placed on the building. *Id.* at 795, 797. Given these considerations, the California Supreme Court ruled that the cross violated the No Preference Clause.

As the Court of Appeals noted, nearly every one of the factors identified in *Fox* is present in the instant case: the Mount Helix cross is 36 feet tall, prominently situated atop one of the highest hills in the San Diego area, and located in a park which, by deed restriction, may contain no other religious monument. App. 18, 22-25. *Fox* thus provides sufficient grounds to determine with confidence how a state court would rule on respondent's claim. Accordingly, the district court was obliged to exercise its jurisdiction and resolve the state constitutional question. *County of Allegheny v. Frank Mashuda Co., supra*, 360 U.S. at 188-89.

Petitioners' attempt to distinguish *Fox* is unavailing. Three purported distinctions are cited: first, that the *Fox* cross was "huge" while the instant cross is merely "large"; second, that the *Fox* cross was affixed to city hall,

while the instant cross is some distance from a public building; and third, that the *Fox* cross was erected with a religious motivation, while the instant cross was erected "as a personal memorial." Petition at 12-13. With respect to the first distinction, the difference between a "large" cross and a "huge" cross – both of which can be seen for miles[1] – is hardly of constitutional dimension. As to the second, petitioners argue that "a reasonable observer would not associate the location of the Mount Helix cross with government," unlike the cross in *Fox*. But a "reasonable observer" would have considerable difficulty dissociating the highest hilltop in the region, which is home to a well-known public park and nature theatre, from the government that owns it. Finally, the third distinction is false: the religious motivation of the Mount Helix cross is amply demonstrated by the deed restrictions accompanying its transfer to petitioners, as the courts below observed. App. 23-24; 69-70.

Petitioners' effort to distinguish *Fox* fails on a more fundamental level as well. If, as petitioners suggest, abstention is required whenever state law precedent fails to correspond, fact-for-fact, with a pending dispute, federal courts would lose jurisdiction over most state law

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[1] Petitioners assert that the Court of Appeals erred in stating that the Mount Helix cross is "visible from a substantial distance" (App. 10), when in fact it is "only visible from the town of La Mesa and its vicinity." Petition at 13. The town of La Mesa, however, stretches approximately two to three miles away from the cross. If two miles is not a "substantial distance," the distinction makes no difference: the cross indisputably occupies a "commanding skyline presence" over the City of La Mesa, and can be seen by thousands. App. 71.

claims. The issue of "uncertainty" under *Pullman* does not turn on distinctions between "large" crosses and "huge" ones, however, or between crosses on city halls and crosses on towering hilltops. If it did, the "narrow exception" would swallow the jurisdiction it was created to qualify. To the contrary, a question of state law "is not 'doubtful' . . . just because it turns on the facts of the particular case. Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with *any* confidence how the state's highest court would decide" the issue. *Pearl Investment Co. v. City and County of San Francisco, supra,* 774 F.2d at 1463-65 (emphasis added). *Fox* provided the district court with ample grounds to make that judgment, and the Court of Appeals correctly affirmed.

C. Additional Decisions Provide Clear Guidance For The Adjudication Of Respondent's State Law Claim

In addition to *Fox,* two other decisions construing the No Preference Clause were relied upon by the courts below. Each provides important additional guidance for the interpretation of the No Preference Clause.

In *Okrand v. City of Los Angeles,* 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (Cal.Ct.App. 1989), the court upheld the display of a menorah in the rotunda of Los Angeles City Hall. Petitioners dismiss the case as "not helpful," asserting that its "situation is dissimilar from the existence of a cross on a hill. *Okrand* relies on a context-

specific approach and thus is of no guidance" in resolving respondent's claim.[2] Petition at 14.

Needless to say, a case need not share identical facts to shed light on the analysis of a related dispute – even if that analysis is "context-specific." In fact, *Okrand* provides an important explication of the principles underlying Fox's "no preference" analysis. 207 Cal. App. 3d at 578-80; *see* note 2, *supra*. Of particular interest is the court's discussion of the religious significance of the Latin cross, as well as the analytic import of the city's inclusion of other religious symbols in the challenged display. *Id.* at 579-80. Both considerations directly affected the analysis of the courts below. App. 67-74; 19-20.

The decision of the Ninth Circuit in *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992), offers further guidance. In *Hewitt*, the Ninth Circuit ruled that a public park containing religious statuary

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[2] Petitioners make this claim despite the fact that the *Okrand* court based its decision, in part, on a comparison between the religious significance of the menorah and the Latin cross. The court noted that the "menorah . . . differs in degree from the Latin cross in terms of its significance as a symbol of religion. The cross is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity. The menorah's significance to Judaism, on the other hand, is much less direct." *Id.* at 579-80. *Okrand* also reiterated *Fox's* holding that "the city's failure or inability to recognize the symbols or holidays of other religions showed a clear act of preference." *Id.* at 579. Petitioners' characterization of this analysis as "not helpful" to the instant dispute is difficult to grasp.

depicting the life of Jesus Christ violated the No Preference Clause, based on the teachings of *Okrand* and *Fox*. As expected, petitioners dismiss *Hewitt* as "highly fact specific, and thus of no assistance in this case." Petition at 15. As set forth in the opinions of the courts below, however, the *Hewitt* decision addressed important aspects of the "no preference" analysis relating directly to respondent's claim.[3] App. 64-66; 19-20.

Fox, *Okrand*, and *Hewitt* set forth in considerable detail the appropriate analysis of claims arising under the No Preference Clause of the California Constitution. In view of these authorities, any decision to abstain from adjudicating respondent's state constitutional claim would have amounted to an impermissible "[a]bdication of the obligation" to exercise federal jurisdiction. *County of Allegheny v. Frank Mashuda Co.*, *supra*, 360 U.S. at 188.

II. The Decision Of The Court Of Appeals Does Not Conflict With *Reetz v. Bozanich*

Petitioners also assert that the decision of the Court of Appeals conflicts with the holding of this Court in *Reetz v. Bozanich*, *supra*, 397 U.S. 82. The claim is baseless. *Reetz* involved a unique state constitutional provision that had never been interpreted by a state court, and that bears no relation to any federal constitutional provision.

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[3] As in the instant case, the *Hewitt* court weighed the significance of a "deed requir[ing] that the statuary not be altered," as well as the statuary's "dominance of the landscape," in concluding that the statues "are more symbols of worship than museum pieces." 940 F.2d at 1568. Its analysis of these factors informed the decisions of the courts below. *See* App. 65 n.24.

This dispute conversely involves a provision that has been repeatedly interpreted by state courts, and that relates closely to the federal Establishment Clause. The decision of the courts below to adjudicate respondent's No Preference Clause claim accordingly creates no conflict with the unrelated abstention analysis in *Reetz v. Bozanich*.

At issue in *Reetz* were provisions of the Alaska state constitution addressing fishing rights. 397 U.S. at 84. The provisions had never been interpreted by an Alaska court. *Id.* at 85-86. The Court noted that "the constitutional provisions relate to fish resources, an asset unique in its abundance in Alaska." *Id.* at 87. In view of these unusual circumstances, the Court determined that "the first judicial application of these constitutional provisions should properly be by an Alaska court." *Id.* (emphasis added).

Conversely, the religion clauses of the California Constitution have been construed by state courts for over one hundred years (*see, e.g., Ex parte Newman*, 9 Cal. 502, 506-07 (Cal. 1858)), and the No Preference Clause has been applied repeatedly in cases such as *Fox* and *Okrand*. As the preceding discussion makes plain, there is no dearth of state authority construing the constitutional provision at issue here. *Supra*, pp. 7-11.

This case differs from *Reetz* in another important respect. The federal Constitution contains no provision remotely resembling the state constitutional rights addressed in *Reetz*, and federal courts bring no special expertise to the issue. Conversely, California's No Preference Clause is closely related to the federal Establishment

Clause, even though it is "unique" in the sense that its language is different and its protections more expansive. *Okrand, supra,* 207 Cal. App. 3d at 571. Thus, as the court in *Okrand* observed, federal Establishment Clause cases may serve as "compelling guides" in construing the religion clauses of the California Constitution. 207 Cal. App. 3d at 571-72; *see also Hewitt v. Joyner, supra,* 940 F.2d at 1567. Indeed, both *Fox* and *Okrand* cite federal cases in support of their analysis of the No Preference Clause. *Okrand,* 207 Cal. App. 3d at 579; *Fox,* 22 Cal. 3d at 798-99. Petitioners do the same. Petition at 12.

For this reason, federal courts are far better equipped to address questions arising under the No Preference Clause than questions arising under Alaska's constitutional fishing provisions. The *Reetz* abstention analysis is inapposite on this basis as well.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

JORDAN C. BUDD
Counsel of Record
ACLU Foundation of San Diego
& Imperial Counties
1202 Kettner Blvd., Suite 6200
San Diego, CA 92101
(619) 232-2121

LEONARD B. SIMON
RANDI D. WEINBERGER
MILBERG, WEISS, BERSHAD,
HYNES & LERACH
600 W. Broadway, Suite 1800
San Diego, CA 92101
(619) 231-1058

Counsel for Respondent

Supreme Court, U.S.
FILED
JUN 9 1994
OFFICE OF THE CLERK

(3)

No. 93-1692

In The

Supreme Court of the United States

October Term, 1993

COUNTY OF SAN DIEGO, AND
THE BOARD OF SUPERVISORS FOR THE
COUNTY OF SAN DIEGO,

Petitioners,

v.

JOHN MURPHY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

LLOYD M. HARMON, JR.
County Counsel
DIANE BARDSLEY, Chief Deputy
By IAN FAN, Deputy
1600 Pacific Highway, Room 355
San Diego, California 92101
Telephone: 619-531-6218

Counsel of Record
for Petitioners

JEROME A. BARRON
720 20th Street, N.W.
Washington, D.C. 20052

Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONERS' REPLY MEMORANDUM

I. The California No Preference Clause Has No Federal Counterpart, And The Federal Courts Should Abstain Pending Resolution Of The State Constitutional Claim By A State Court

Respondent contends that the California no preference clause relates closely to the Establishment Clause of the First Amendment. Respondent also asserts that the no preference clause has repeatedly been interpreted by California state courts. Therefore, respondent asserts that the meaning of the no preference clause is clear and that a federal court may interpret the state constitutional provision in the first instance. Opposition at 11.

In short, the thrust of respondent's contention is that there is little difference in language or interpretation between the no preference clause and the religion clauses of the First Amendment. Opposition at 12. Respondent thereby suggests that a federal court had interpretive caselaw to guide it, and that the doctrine of *Reetz v. Bozanich*, 397 U.S. 82 (1970) is not applicable. Respondent's analysis of the no preference clause is faulty. The courts below should not have attempted to interpret the clause themselves, but should have abstained and awaited interpretation of the clause by a state court.

The court of appeals reached a conclusion similar to that asserted by respondent: "The legal landscape presented here differs dramatically from that presented in

Reetz, by Alaska's unique and uninterpreted constitutional provisions regarding fishing rights. Here, we have interpretive caselaw." App. 14.

While there may be interpretive case law about the no preference clause, there is also great disagreement on the California Supreme Court about the appropriate interpretation of that clause. Moreover, the California Supreme Court has indicated that the no preference clause does not mirror the federal constitution's religion clauses but markedly departs from those clauses both in text and in interpretation. Therefore, respondent's premise fails.

One need not look far for indications that the meaning of the no preference clause is unclear. The court of appeals acknowledged the intense disagreement about that clause's meaning within the California Supreme Court. *See* App. 14, n.3. That discussion set forth the various opinions of the justices of the California Supreme Court in *Sands v. Morongo Unified School Dist.*, 53 Cal.3d 863 (1991), *cert. denied*, 112 S. Ct. 3026 (1992).

The opinions in *Morongo* stress the unique character of the no preference clause. These opinions provide a powerful argument in favor of the distinctive character of that provision and the necessity of having it interpreted first by a state court. In *Morongo*, Justice Kennard in her plurality opinion referred to the no preference clause as "having no counterpart[ ] in the federal charter." 53 Cal.3d at 883. She specifically emphasized the distinct function of the no preference clause:

> "The Attorney General of this state has observed that '[i]t would be difficult to imagine

> a more sweeping statement of the principle of governmental impartiality in the field of religion' than that found in the 'no preference' clause, and California courts have interpreted the clause as being more protective of the principle of separation than the federal guarantee."

Id. (citations omitted).

In a concurring opinion, Justice Mosk also stressed the particular and unique character of the no preference clause. "It is undisputed that provisions of the California Constitution are not dependent for their meaning on the federal Constitution." *Id.* at 907 (Mosk, J., concurring). Justice Mosk examined the text and history of the no preference clause:

> "Article I, section 4. provides, 'Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion.' To be sure, the establishment clause of this section is virtually identical to its federal counterpart. But the free exercise clause (hereafter the preference clause) of article I, section 4, is without parallel in the federal Constitution. The Attorney General has emphasized the broad scope of the preference clause: 'It would be difficult to imagine a more sweeping statement of the principle of government impartiality in the field of religion.' [citation omitted]. Our case law has also recognized the strength of this clause, and acknowledged that in some instances it might warrant a separation of church and state more strict than that called for in the federal Constitution. As we stated in *Fox v. City of Los Angeles* (1978), 22 Cal.3d 792, 796 [150 Cal.Rptr. 867, 587 P. 2d 663], under article I,

> section 4, 'Preference thus is forbidden even where there is no discrimination. The current interpretations of the United States Constitution may not be that comprehensive.' "

Id. at 910-11. After canvassing a series of California cases construing the no preference clause, Justice Mosk concluded by pointing out its unique function: "From these decisions, we learn that the preference clause seeks to prevent government from giving *any* advantage to religion in California." *Id.* at 911 (emphasis in original).

Although both Justice Kennard in the plurality opinion for the Court in *Morongo* and Justice Mosk, concurring, suggest that the no preference clause may be more sweepingly separationist than the federal constitution's Establishment Clause, Justice Panelli reached the opposite conclusion:

> "I find nothing in the history of this provision to support the conclusion that its framers intended to create a 'wall of separation' higher than that established by the federal establishment clause. Indeed, to the extent the concept of 'separation' might counsel official toleration of illegal acts compelled by religious belief, the framers appear to have intended a somewhat lower wall.
>
> . . .
>
> "In summary, I cannot find in the 'preference or discrimination' clause an interest to erect the absolute 'wall of separation' that would justify a decision to ban religious invocations at high school graduation ceremonies. Instead, the clause appears to add only the requirement that the state not prefer, or discriminate against, a particular sect."

Id. at 933-35 (Panelli, J., dissenting).

Justice Baxter, also dissenting in *Morongo*, concluded that the no preference clause was not violated by allowing religious invocations at public high school graduation ceremonies. Justice Baxter took a view of the no preference clause which was not separationist. *Id.* at 945-46 (Baxter, J., dissenting).

The foregoing discussion of the numerous opinions in *Morongo* indicates that whether the no preference clause is sweepingly separationist – or not separationist at all – is a matter of intense dispute in the California Supreme Court. This dispute underscores the appropriateness of awaiting prior state court resolution of the issue.

Moreover, even if it were clear that the no preference clause is sweepingly separationist, abstention would still be appropriate. Abstention has been held to be appropriate even if the state constitution provides greater protection than exists under the federal constitution and even if, in such circumstances, the state provision mirrors a federal constitutional provision. *See Fields v. Rockdale County*, 785 F.2d 1558 (11th Cir.), *cert. denied*, 478 U.S. 1020 (1986). In *Rockdale*, Chief Judge Godbold concluded: "The relevant Georgia constitutional provision does mirror the language of the Fourteenth Amendment due process clause, but the Georgia decisional law . . . is a strain of substantive due process that extends protections beyond what federal due process alone affords." 785 F.2d at 1561. Accordingly, the Eleventh Circuit ordered abstention in *Rockdale*. *Id.* at 1563. Where a state constitutional provision has a distinctive mission in that state's constitutionalism, federalism requires some deference toward that mission.

Despite the sharp disagreements reflected in the opinions of the Justices of the California Supreme Court in *Morongo*, the court of appeals somewhat inexplicably concluded that "the varied viewpoints" expressed there do not necessarily indicate "an interpretive shift" nor do they undermine "prior state court opinions interpreting the No Preference Clause." App. 14 n.3. The number of votes which a particular interpretation of a state constitutional provision can command on the state supreme court is not the issue with which *Reetz* is concerned. The fundamental issue with which *Reetz* is concerned is whether the state constitutional provision has a federal constitutional counterpart or whether it is unique. Here it is evident that the no preference clause has no federal constitutional counterpart. It is equally evident that the meaning of the no preference clause is not sufficiently clear as applied to the facts of this case to make it appropriate for a federal court to interpret that clause in the first instance.

II. The Decision Of The Court Of Appeals Clearly Conflicts With *Reetz v. Bozanich*

Respondent rejects petitioners' contention that the court of appeals' decision violated *Reetz*. Both that decision and respondent take a rigidly narrow view of the *Reetz* doctrine. In their view, *Reetz* instructs a federal court to abstain and allow a state court to interpret a unique provision of state constitutional law only if that provision had not previously been interpreted by a state court. Opposition at 12. As it happened, the fishing rights provision of the Alaska state constitution at issue in *Reetz*

had not been previously interpreted by an Alaska state court.

But the failure of state courts to interpret a state constitutional provision is not the key to invoking the *Reetz* doctrine; the key is whether the state constitutional provision is unique and whether the issue of state constitutional law presented is uncertain. *Reetz*, 397 U.S. at 86. Thus, abstention is unnecessary if the state constitutional provision is the mirror image of the federal constitutional provision. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (no abstention under federal due process claim not complicated by unresolved state law question, where plaintiffs could have sought relief under similar provision of state constitution). A contrary doctrine would have destructive consequences for the resolution of federal constitutional issues by federal courts. As an eminent scholar in the field of federal jurisdiction recently stated, "[f]ederal court abstention is required, however, when the state has a constitutional provision unlike any that exists in the United States Constitution and the state court's construction of that clause might make the federal court ruling unnecessary.". E. Chemerinsky, *Federal Jurisdiction* 694 (2d ed. 1994).

Petitioner submits that prior interpretation by the state court of the no preference clause would make resolution of the federal constitutional issue presented here unnecessary. It would also provide an opportunity for the state courts to resolve in the first instance some of the complexities and ambiguities that are clearly present under the no preference clause. "[W]here the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the district courts to

abstain." *Harris County Comm'r Court v. Moore*, 420 U.S. 77, 84 n.8 (1975) (citing *Reetz*).

III. The *Fox* Case Is Not Dispositive

Respondent's opposition devotes considerable space to the proposition that *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978), involving the display of a cross on public property, is squarely on point and thus "provides sufficient grounds to determine with confidence how a state court would rule. . . . " Opposition at 7. However, this argument tellingly ignores those efforts which the court of appeals had to make in order to distinguish a case in which a public cross was held not to violate the no preference clause. *See Carpenter v. City & County of San Francisco*, 803 F.Supp. 337 (N.D.Cal. 1992), *appeal docketed*, No. 92-16767 (9th Cir. Oct. 29, 1992).

Although the fact pattern in *Carpenter* is similar to the facts of this case, the court of appeals attributed the different result in *Carpenter* to "the fact-based contextual inquiry required by these kinds of cases." App. 25 n.5. In *Carpenter*, the court found that *Fox* was distinguishable. *Carpenter*, 803 F.Supp. at 343. The most important factor in this finding was physical location: "the *Fox* cross was illuminated on city hall, thereby giving it the official stamp of governmental approval." *Id.* The *Carpenter* court also found that the Mount Davidson cross, "which has stood for fifty-seven years, serves as a reminder of an empirical past. . . . " *Id.*

The same is true of the Mount Helix cross. Contrary to petitioner's assertion, a reasonable observer would not

associate the Mount Helix cross with the County of San Diego. Petitioner's own experience refutes his assertion: although he lived in the area for many years, petitioner did not know the cross was situated on County land for seventeen years. This is not the case of a cross which was illuminated on city hall.

In addition, as in *Carpenter,* the Mount Helix cross serves as a reminder of an empirical past. The mere length of time it has been part of the community is sufficient to establish this. While the landmarks of San Diego may not be as universally recognizable as the Golden Gate Bridge and Coit Tower, they form the basis of San Diego's cultural heritage and as such are entitled to recognition. The Mount Helix cross is part of this heritage.

Respondent would have the *Fox* case operate as a *per se* rule precluding any cross found on government property. Yet the answer is not as simple as that, and this is why the issue of state law remains uncertain. The *Carpenter* case, and the court of appeals' attempt to distinguish it, illustrate this point precisely.

IV. Conclusion

In *Reetz*, this Court made it clear that *Pullman* abstention "should be applied only where 'the issue of state law is uncertain.' " 397 U.S. at 86 (citation omitted). Respondent submits that this is such a case. The petition for certiorari should be granted.

Respectfully submitted,

LLOYD M. HARMON, JR.
County Counsel
DIANE BARDSLEY, Chief Deputy

By IAN FAN, Deputy

Counsel of Record for Petitioners

JEROME A. BARRON

Of Counsel